RECEIVED
DEC 1 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-5799

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THOMAS RAY JAMES, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

DAVID P. BERGSCHNEIDER
Assistant Defender
Office of the State Appellate Defender
Fourth Judicial District
300 East Monroe, Suite 102
Springfield, IL 62701
(217) 782-3654

COUNSEL FOR PETITIONER

DANIEL D. YUHAS
Deputy Defender

OF COUNSEL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THOMAS RAY JAMES, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Thomas Ray James, respectfully requests this Court, in accord with his attached affidavit, for leave to file Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fourth Judicial District, without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

David Bergschneider

DAVID BERGSCHNEIDER
Assistant Defender

COUNSEL FOR PETITIONER

IN FORMA PAUPERIS AFFIDAVIT

THOMAS RAY JAMES

(Petitioner)

v.

PEOPLE OF THE STATE OF ILLINOIS

(Respondent (s))

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, THOMAS RAY JAMES, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes ☐ No ☑

   (a) If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

   (b) If the answer is "no," state the date of past employment and the amount of the salary and wages per month which you received.

   11/9/80 ($115.00 PER MO.)

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment? Yes ☐ No ☑

   b. Rent payments, interest or dividends? Yes ☐ No ☑

c. Pensions, annuities or life insurance payments? Yes ☐ No ☑

d. Gifts or inheritances? Yes ☑ No ☐

e. Any other sources? Yes ☐ No ☑

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

E. C. James (Father) $150.00

A. M. Owens (Mother) 10.00

Christmas Gifts

3. Do you own cash, or do you have money in a checking or savings account?

Yes ☑ No ☐ (Include any funds in prison accounts.)

If the answer is "yes," state the total value of the items owned. $173.00 Nov. 21 1980 (Bal)

Inmates Trust Fund Acct

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ☐ No ☑

If the answer is "yes," describe the property and state its approximate value. —

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. —

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Thomas R. James A-10497
(Petitioner's signature)

State of Illinois

County (City) of Randolph

Thomas Ray James, being first duly sworn under
(Name of Petitioner) oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

Thomas R. James A-10497
Signature of Petitioner
(Required as to each petitioner)

Subscribed and sworn to before me this
24th day of Nov., 1979.

Notary Public or other person
authorized to administer an oath.

My Commission Expires Feb. 8, 1984

Certificate

I hereby certify that the petitioner herein has the sum of $_____ on account to his credit at the _____ institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said _____ institution:

_____

_____

_____

_____

_____
Authorized Officer of Institution

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THOMAS RAY JAMES, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

NOTICE OF MOTION AND PROOF OF SERVICE

TO: Mr. Michael Rodak, Jr.
Clerk of the Supreme Court
Of the United States
1 First Street N.E.
Washington, DC 20543

Mr. Thomas J. Fahey
State's Attorney
Vermilion County Courthouse
Danville, IL 61832

Mr. Tyrone C. Fahner
Attorney General of Illinois
188 W. Randolph, Ste. 2200
Chicago, IL 60601

Mr. Thomas Ray James
Register No. C-10447
Box 711
Menard, IL 62259

Please take notice that I have mailed one copy of the Motion for Leave to Proceed in Forma Pauperis in the above-captioned matter to the Clerk of the United States Supreme Court and I am serving the Attorney General, State's Attorney and the Petitioner each with one copy mailed in envelopes with sufficient prepaid postage deposited in the mail in Springfield, Illinois and addressed as indicated above on this 26th day of November 1980.

David Bergschneider

DAVID BERGSCHNEIDER
Assistant Defender

COUNSEL FOR PETITIONER

Nov. 26, 1980

RECEIVED
DEC 1 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-5799

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THOMAS RAY JAMES, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

DAVID P. BERGSCHNEIDER
Assistant Defender
Office of the State Appellate Defender
Fourth Judicial District
300 East Monroe, Suite 102
Springfield, IL 62701
(217) 782-3654

COUNSEL FOR PETITIONER

DANIEL D. YUHAS
Deputy Defender

OF COUNSEL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THOMAS RAY JAMES, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

QUESTIONS PRESENTED FOR REVIEW

A.

Under what circumstances, if any, does an accused waive his right to counsel under Miranda v. Arizona after his request to consult with counsel has been ignored.

1.

Whether police may resume interrogation of an accused who has requested counsel without permitting the accused an opportunity to contact and consult with an attorney.

2.

Should this Court hold that police may resume interrogation without honoring a suspect's request for counsel, what standards are to be utilized to determine whether the accused knowingly and voluntarily withdrew his request before speaking with officers.

B.

Under what circumstances, if any, is the effect of refusing an accused's request to consult with counsel dissipated by subsequent events so that a statement taken in violation of Miranda v. Arizona may be admitted in the prosecution's case in chief.

TABLE OF CONTENTS

		Page
I.	Opinion Below	1
II.	Jurisdiction	2
III.	Constitutional Provisions Involved	2
IV.	Statement of the Case	2
V.	Reasons for Granting Certiorari	10
	A. 1. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY CONFUSION IN THE LOWER COURTS CONCERNING WHETHER POLICE MAY REFUSE TO HONOR AN EXPLICIT POST-ARREST REQUEST FOR COUNSEL, AND MAY INSTEAD RENEW INTERROGATION IN AN ATTEMPT TO OBTAIN A STATEMENT.	10
	2. SHOULD THIS COURT HOLD THAT UNDER SOME CIRCUMSTANCES INTERROGATION MAY BE RENEWED, IT SHOULD ESTABLISH GUIDE-LINES FOR THE LOWER COURTS TO DETER-MINE WHETHER THE ACCUSED SUBSEQUENTLY WITHDREW HIS REQUEST FOR COUNSEL	13
	B. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER A QUESTION WHICH IT HAS NOT DECIDED: WHEN, IF EVER, INTERVENING EVENTS CURE A FAILURE TO HONOR A POST-ARREST REQUEST FOR COUNSEL SO THAT STATEMENTS OBTAINED IN VIOLATION OF MIRANDA V. ARIZONA ARE ADMISSIBLE	22
VI.	Conclusion	32
	Appendix A	A-1
	Appendix B	B-1
	Appendix C	C-1
	Appendix D	D-1

TABLE OF AUTHORITIES

Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254 (1975) 23, 24, 25, 27, 30

California v. Stewart, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966) 15

Cobbs v. Robinson, 528 F.2d 1331 (2nd Cir. 1975) cert. denied 424 U.S. 947 12

Fare v. Michael C., 442 U.S. 707, 61 L.Ed.2d 197, 99 S.Ct. 2560 (1979) 11, 25

Page

Maglio v. Jago, 580 F.2d 202 (6th Cir. 1978). 12

Michigan v. Mosley, 423 U.S. 96, 46 L.Ed.2d 313, 96 S.Ct. 321 (1975) 11, 17

Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966) 10, 14, 24

Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) 12

People v. Morgan, 67 Ill.2d 1, 364 N.E.2d 56 (1977) 13

People v. White, 61 Ill.2d 288, 335 N.E.2d 457 (1975) cert. denied 424 U.S. 970. . . . . 23, 24

Rawlings v. Kentucky, ___U.S. ___, 65 L.Ed.2d 633, 100 S.Ct. ____ (1980). 28

Rhode Island v. Innis, ___U.S. ___, 64 L.Ed.2d 397, 100 S.Ct. ___ (1980) 12, 13

State v. Boone, 220 Kan. 758, 556 P.2d 864 (1976) 13

State v. Stone, Me., 397 A.2d 989 (1979). 13

U.S. ex rel Williams v. Twomey, 467 F.2d 1248 (7th Cir. 1972) 12

United States v. Grant, 549 F.2d 942 (4th Cir. 1977) cert. denied 432 U.S. 908 12

United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir. 1978) cert. denied 436 U.S. 919 12

Westover v. United States, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966) 18

White v. Finkbeiner, 611 F.2d 186 (1970) (Petition for Certiorari pending, No. 79-6601) 12, 23

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THOMAS RAY JAMES, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

The Petitioner, Thomas Ray James, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Appellate Court of Illinois Fourth Judicial District, entered on March 28, 1980.

I.

OPINION BELOW

The opinion of the Appellate Court of Illinois for the Fourth Judicial District is reported at 82 Ill.App.3d 551, 7 Ill.Dec. 934, 402 N.E.2d 936. A copy of the opinion is attached hereto as Appendix A.

II.

JURISDICTION

The judgment of the Appellate Court of Illinois for the Fourth Judicial District was entered on March 28, 1980. On April 28, 1980, the Appellate Court denied a Petition for Rehearing in an order, a memorandum of which is appended hereto as Appendix B. On September 29, 1980, the Illinois Supreme Court denied a Petition for Leave to Appeal in an order, a memorandum of which is appended hereto as Appendix C. This Petition is filed within sixty (60) days of the order of the Supreme Court of Illinois. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

III.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT V.

> No person . . . shall be compelled in any criminal case to be a witness against himself, . . .

AMENDMENT XIV

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV.

STATEMENT OF THE CASE

Prior to trial, Mr. James raised the federal question involved in this petition by moving to suppress his post-arrest statements on the grounds that the statements were

involuntary, had been obtained in violation of Miranda v. Arizona because police ignored a request for counsel, and had been made in response to unfulfilled promises. (C. 191-194) A hearing on the motion to suppress was held August 11, 1978. The following testimony was introduced:

Deputy Carey testified that he arrested Mr. James during the late afternoon on Wednesday, May 17, 1978. (C. 209) (The transcript of the suppression hearing is included in Volume II of the record.) As Carey and Mr. James were riding in the squad car on their way to the police station, Mr. James asked if he would be allowed to make a phone call at the jail. (C. 215) Carey replied that he could. (C. 214) Mr. James then asked if he could make a second call if the line was busy the first time, and Carey said that he could. (C. 215)

After a minute or two had passed, Mr. James said that he "would like to talk to an attorney." (C. 216, 227) Carey said that Mr. James would be allowed to do so. (C. 217) At Mr. James's request, Carey advised him of his Miranda rights. (C. 215, 217) Mr. James stated that he understood his rights. (C. 219)

Upon arriving at the police station, Carey informed Investigator William Hartshorn, who was in charge of the investigation, that Mr. James had been advised of his rights and had asked to speak to an attorney and to use the telephone. (C. 224, 236) Carey told Hartshorn that Mr. James had been told that he would be allowed to speak with an attorney and to use the telephone. (C. 224)

Hartshorn admitted that he had been told by Carey that Mr. James had asked to speak to an attorney. (C. 236) Despite Hartshorn's knowledge of Mr. James's request, he and Investigator Larry Rollins immediately began to interrogate

Mr. James. (C. 238) At approximately 6:20 p.m., Rollins read the Miranda rights form to Mr. James, who initialed the form. (C. 240-241, 318) The form did not contain an express waiver of the right to counsel, but contained only a general statement that Mr. James knew, understood, and "waived" all his constitutional rights. (Vol. IV, R. 419) Neither Hartshorn nor Rollins mentioned the prior request for counsel or disclosed to Mr. James that Hartshorn was aware of the request. Neither officer expressly asked Mr. James whether he wanted to see an attorney or whether he was willing to talk without an attorney. Mr. James was interviewed from 6:20 p.m. until 6:58 p.m. (C. 240-241, 318)

At 6:58 p.m., Mr. James ate supper. (C. 318) Mr. James was again interrogated from 7:24 through 8:21 p.m., and another break occurred from 8:21 to 8:53 p.m. (C. 241, 246, 272, 277, 278, 319) At some point between 8:00 p.m. and 8:53 p.m., Mr. James asked to use the telephone and was allowed to call his employer. (C. 247, 273, 294, 321-323)

After the phone call, Mr. James was questioned by Investigators LeConte and Woodward. (C. 249, 325, 348-349, 367, 380) At LeConte's request, Mr. James initialed a second Miranda rights form. (C. 349-350) This form, like the others which Mr. James initialed, did not contain an express waiver of the right to counsel. (Vol. IV, R. 419) The interrogation by LeConte and Woodward dealt primarily with the death of David Holler, the offense with which Mr. James was charged in this case.[1] (C. 367, 380)

---

[1] It should be noted that Mr. James was interrogated concerning two separate but related transactions. The present appeal is from a murder conviction involving the death of David Holler, who died on May 8, 1978, nine days before Mr. James was arrested. In a related prosecution, Mr. James was convicted of attempt murder involving a fight with Samuel Cartwright, and was sentenced to serve thirty years imprisonment. The attempt murder conviction was affirmed in an unreported order by the Appellate Court of Illinois, Fourth Judicial District, and is not involved in this appeal.

About 11:00 p.m., Mr. James was allowed to speak with his mother and stepfather, who had come to the police station. (C. 250, 325) Mr. James was placed in a cell about midnight. (C. 250, 325-326)

The following day, May 18, Mr. James was interviewed by Hartshorn and Rollins from 11:00 a.m. until 1:00 p.m. (C. 250, 326-329) At the request of the officers, Mr. James initialed a third Miranda rights form. (C. 260-261, 326-328) This form was identical to the forms signed on the previous day in that it did not contain an express waiver of counsel. Mr. James did not repeat his earlier request to speak with an attorney, and the officers did not indicate to Mr. James that they were aware of the earlier request. (C. 261) This interrogation also centered on the death of David Holler. (C. 338)

From 1:00 to 2:00 p.m., Mr. James ate lunch and spoke with his parole officer. (C. 245, 262, 329) Mr. James took a polygraph examination from 2:55 to 4:10 p.m. (C. 330) Hartshorn and Rollins again interviewed Mr. James from 4:15 p.m. to 4:25 p.m. (C. 263, 330-331)

Upon Hartshorn's orders, LeConte and Woodward interviewed Mr. James again from 4:30 to 6:05 p.m. (C. 263, 331, 353, 370) During this interrogation, Mr. James admitted shooting David Holler. (C. 358) Mr. James also drew several maps which were admitted at trial. (C. 358)

At 7:30, Mr. James was allowed to eat dinner. (C. 331) Mr. James visited with his father from 7:30 through 8:20 p.m., and with Carolyn Burris from 8:30 to 9:20 p.m. (C. 264, 331-332)

LeConte and Woodward interrogated Mr. James again from 9:20 p.m. until 10:45 p.m. (C. 264, 290, 332, 354, 360) During this interrogation, Mr. James made a written statement admitting that he had killed David Holler. (C. 264, 290, 332, 354, 360, 376)

Mr. James testified in his own behalf. While in the squad car after his arrest, Mr. James told Officer Carey that he wanted to make a phone call and speak with an attorney. (C. 410-411) Mr. James also asked the officer to read the Miranda rights because Mr. James thought that he was in trouble. (C. 430) Mr. James had been questioned by police four or five years earlier, but was not fully aware of all his rights. (C. 430-432) Mr. James testified that he did not expect Carey to produce a lawyer in the squad car, but thought that he would be provided with counsel at the police station. (C. 435)

At the police station, Mr. James asked to make a phone call and to be taken to the hospital. (C. 412, 440) Mr. James told Hartshorn that he had not had any sleep and asked that he be allowed to call his parole agent, but was not allowed to do so. (C. 413) Instead, Rollins and Hartshorn took Mr. James to an interview room and asked if they could talk to him. (C. 413) Mr. James asked that Investigator Miller be called because Miller was the only police officer whom he knew. (C. 414) (Miller was called and was present during the first interrogation. (C. 297-300)) Mr. James again asked to use the phone, but Hartshorn refused. (C. 441)

At the officers' request, Mr. James initialed a form indicating that he understood his Miranda rights. (C. 442) The form contained the notation "Murder - Attempt Murder." Mr. James asked if he was charged with those offenses, and the officers replied that the notation was a precaution. (C. 442)

Mr. James testified that he told Rollins that he saw no point in talking with the officers. (C. 417) One of the officers replied it was necessary to ask Mr. James every

question "30 times" because Mr. James's answers "didn't sound right." (C. 417) At that point, Mr. James stopped talking. (C. 417)

A few minutes later, LeConte and Woodward entered the room and began to question Mr. James. (C. 418) Mr. James talked with LeConte and Woodward for about one hour. (C. 419-420) Mr. James was not allowed to use the telephone, and did not call his employer. (C. 420-421, 429, 553)

After being questioned, Mr. James was placed in a cell. (C. 423) Mr. James did not recall speaking with his mother and stepfather on May 17. (C. 421, 442)

Mr. James testified that he did not renew his request for counsel after arriving at the police station because he was continually questioned about the offenses and was not asked about his needs. (C. 451)

During the interview on the morning of May 18, Rollins said that he knew that Mr. James had killed Holler, that he was going to make sure that Holler's children found out, and that he would work on the case while Mr. James was in prison on the parole violation and would see that Mr. James was arrested when he was released from prison. (C. 425) After Mr. James took the polygraph examination, Rollins returned Mr. James to an interview room and stated that "even his untrained eye could see" that Mr. James had lied. (C. 426) Hartshorn and Rollins questioned Mr. James for twenty or thirty minutes, and Mr. James stated that he did not want to talk to the officers. (C. 427) Hartshorn and Rollins left the room, and LeConte and Woodward entered. LeConte and Woodward questioned Mr. James for about forty-five minutes. (C. 427)

Mr. James asked Woodward what it would take to stop the questioning, and Woodward replied that the police wanted a statement. (C. 428) Mr. James asked if the questioning would stop if he gave a statement, and Woodward said that it would. (C. 428) At that time, Mr. James gave an oral statement concerning the death of David Holler. (C. 428) Mr. James testified that he gave the statement because he was tired and afraid, because he wanted the questioning to stop, and because he could not tolerate the thought of returning to prison on a parole violation knowing that the State was attempting to convict him on another charge. (C. 454, 469)

During the oral statement, Mr. James asked the police to call his father, mother, and Carolyn Burris. (C. 445) After making the oral statement, Mr. James was allowed to see his father. However, upon entering the room Mr. James's father said that he had agreed to tell the police everything that Mr. James said. (C. 445) Later in the evening, Mr. James saw his mother and Carolyn Burris. (C. 447-448)

The trial court denied the motion to suppress, finding that Mr. James's statement that he "would like to talk to an attorney" was a request for information rather than a request to see an attorney. (C. 506) The trial court held that Mr. James should have known that Deputy Carey could not have provided an attorney in a rural area, and that Mr. James was obligated to repeat his request at the police station in order to exercise his right to counsel. (C. 506-509)

In a jury trial held December 11 through 14, 1978, Mr. James was convicted of murder and armed violence. The statements which Mr. James made on May 18 were admitted into evidence during the State's case-in-chief.

On February 1, 1979, Mr. James was sentenced to forty years imprisonment, to be served consecutively to the thirty year sentence previously imposed in the attempt murder prosecution. (C. 5)

On appeal to the Appellate Court of Illinois, Fourth Judicial District, Mr. James contended that his statement that he would "like to talk to an attorney" was an unambiguous assertion of the right to counsel under Miranda v. Arizona, and that his confessions should have been suppressed because instead of scrupulously honoring his request for counsel, the police and repeatedly interrogated him.

The appellate court held that Mr. James's statement that he "would like to talk to an attorney" was a request for counsel "in the most unambiguous and unequivocal of terms." 402 N.E.2d at 939. However, the appellate court ruled that the defendant knowingly and voluntarily withdrew his request for counsel in the subsequent interrogations. The lower court also held Mr. James's statements were admissible because the effect of the Miranda violation was "sufficiently dissipated" by events which occurred between Mr. James's request for counsel and his statements.

On April 28, 1980, the appellate court denied rehearing. On September 29, 1980, the Illinois Supreme Court denied leave to appeal.

V.

REASONS FOR GRANTING CERTIORARI

A.

1.

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY CONFUSION IN THE LOWER COURTS CONCERNING WHETHER POLICE MAY REFUSE TO HONOR AN EXPLICIT POST-ARREST REQUEST FOR COUNSEL, AND MAY INSTEAD RENEW INTERROGATION IN AN ATTEMPT TO OBTAIN A STATEMENT.

Just after his arrest, Mr. James asked to speak to an attorney, and was told that he could do so at the police station. At the station, Mr. James was immediately interrogated by Investigator Hartshorn, who was informed that Mr. James had asked to speak to an attorney and had been told that he could do so. At Hartshorn's direction, Mr. James was interrogated five additional times over the next twenty-eight hours. During the fifth and sixth interrogations, Mr. James made two statements which, at trial, were introduced in the prosecution's case-in-chief.

The Appellate Court of Illinois, Fourth Judicial District, held that although petitioner's request for counsel had been ignored, the State had established that Mr. James knowingly and voluntarily withdrew that request. The appellate court declined to follow this Court's per se rule of Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), which prohibits resumption of questioning once a request for counsel is made. 402 N.E.2d 936, 940.

In Miranda, this Court made clear that the police may not renew interrogation after a request for counsel is made:

> Once warnings have been given, the subsequent procedure is clear. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.
>
> 384 U.S. 436, 474.

In Michigan v. Mosley, 423 U.S. 96, 46 L.Ed.2d 313, 96 S.Ct. 321 (1975) this Court reiterated Miranda's per se rule where counsel is requested. In response to an assertion that the per se rule applies where the suspect asserts his right to silence, but does not request counsel, this Court noted:

> [C]learly the Court in Miranda imposed no such requirement, for it distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that "the interrogation must cease until an attorney is present" only "[i]f the individual states that he wants an attorney." 384 U.S. at 474.
>
> (423 U.S. 96, 104, n. 10) (See also 423 U.S. 96, 109-110) ((White, J., concurring.)

This Court has recently reaffirmed the per se rule in two cases. In Fare v. Michael C., 442 U.S. 707, 61 L.Ed.2d 197, 99 S.Ct. 2560 (1979), this Court held that a juvenile's request to see his probation officer was not the equivalent of a request for an attorney. Mr. Justice Blackmun, writing for the Court, repeatedly restated with approval that Miranda established a per se rule against interrogation after a request for counsel:

> The per se aspect of Miranda was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country. Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts. For this reason, the Court fashioned in Miranda the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease.
>
> 442 U.S. 707, 719.
>
> It is this pivotal role of legal counsel that justifies the per se rule established in Miranda, and that distinguishes the request for counsel from the request for a probation officer, a clergymen, or a close friend.
>
> 442 U.S. 707, 722.

The per se rule was most recently reiterated by this Court last term in Rhode Island v. Innis, ___U.S. ___, 64 L.Ed.2d 297, 100 S.Ct. ___ (1980). Writing for the Court, Mr. Justice Stewart twice reaffirmed that Miranda imposed a per se rule barring interrogation after a request for counsel. 64 L.Ed.2d 297, 302-303, 305-306.

Despite this Court's holdings, lower courts are in confusion concerning whether interrogation must cease where the accused requests counsel. For example, the Seventh Circuit originally followed this Court's per se rule. U.S. ex rel Williams v. Twomey, 467 F.2d 1248, (7th Cir. 1972). In White v. Finkbeiner, 611 F.2d 186 (1979) (Petition for Certiorari pending, No. 79-6601), the Seventh Circuit rejected the per se rule and adopted a case-by-case analysis of whether waiver had occurred.

Other circuit courts are having similar difficulty determining this issue. In Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979), the Fifth Circuit acknowledged the existence of the per se rule, but permitted inquiry if the request for counsel was ambiguous. In Cobbs v. Robinson, 528 F.2d 1331 (2nd Cir. 1975), cert. denied 424 U.S. 947, the Second Circuit, without mentioning the mandate of Miranda, adopted a case-by-case adjudication of waiver. In United States v. Grant, 549 F.2d 942 (4th Cir. 1977), cert. denied 432 U.S. 908, the Fourth Circuit rejected the per se rule of Miranda. Finally, in United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir. 1978), cert. denied 436 U.S. 919, the Ninth Circuit held that the per se rule was inappropriate and adopted a case-by-case inquiry.

The Sixth Circuit, on the other hand, in a case involving the Sixth Amendment right to counsel, recognized that Miranda had imposed a per se rule in Fifth Amendment cases. Maglio v. Jago, 580 F.2d 202 (6th Cir. 1978).

The confusion reflected by these opinions is also present among the states. For example, Kansas follows the per se rule mandated by Miranda. State v. Boone, 220 Kan. 758, 556 P.2d 864 (1976). Maine and Illinois, among others, have declined to adopt the per se rule. State v. Stone, Me., 397 A.2d 989 (1979); People v. Morgan, 67 Ill.2d 1, 364 N.E.2d 56 (1977).

In the case at bar, the appellate court concluded, without mentioning this Court's opinions, that the per se rule was not valid. It is petitioner's position that under the prior holdings of this Court, a request for counsel cannot be knowingly and voluntarily waived in response to renewed interrogation by police unless the suspect has had an opportunity to consult an attorney. As this Court's opinion in Rhode Island v. Innis made clear, a suspect may volunteer information even after requesting counsel. 64 L.Ed.2d 297, 307. In Innis, however, the police did not question the defendant, but instead honored his right to cut off questioning until an attorney was present. In this case, by contrast, the defendant did not confess until he had been interrogated several times by police officers who knew that he had requested an attorney.

Because the lower courts are in confusion concerning the per se rule, this Court should grant certiorari to clarify that interrogation must cease upon a suspect's request to consult with counsel.

2.

SHOULD THIS COURT HOLD THAT UNDER SOME CIRCUMSTANCES INTERROGATION MAY BE RENEWED, IT SHOULD ESTABLISH GUIDELINES FOR THE LOWER COURTS TO DETERMINE WHETHER THE ACCUSED SUBSEQUENTLY WITHDREW HIS REQUEST FOR COUNSEL.

Should this Court reverse the per se rule of Miranda and permit police interrogation after a request for counsel,

it should establish standards for determining whether a defendant has voluntarily withdrawn his request.

Even where no request for counsel is made, the State bears a heavy burden to demonstrate that the accused knowingly and intelligently waived his right to counsel. Miranda v. Arizona, 384 U.S. 436, 475. Where a request for counsel has been ignored, the State's burden should be at least as great, if not greater.

In this case, the appellate court specified several factors which it said established that Mr. James knowingly and voluntarily withdrew his request for counsel. First, the court emphasized that nearly twenty-four hours passed between "the violation of Miranda and the statements sought to be suppressed." 402 N.E.2d at 941. However, this finding rests upon a misconception of an officer's duty once a request for counsel is made. The appellate court assumed that the only Miranda violation occurred when Investigator Hartshorn began the first interrogation approximately thirty minutes after petitioner's request for counsel. However, Hartshorn and the officers under his direction renewed interrogation six separate times between petitioner's request for counsel and his eventual confessions. The police violated Miranda each time they re-interrogated petitioner without providing an opportunity to consult counsel or, at the very least, clearly ascertaining that petitioner had changed his mind and wanted to speak with the officers without consulting an attorney.

Had Mr. James been left alone for twenty-four hours, without any attempt at interrogation, the appellate court's reasoning might be more persuasive. However, because Mr. James was questioned repeatedly during the intervening period, a knowing and voluntary retraction of his request for counsel is less likely. It is far more likely as

this Court found in California v. Stewart (a companion case to Miranda), that Mr. James confessed because of persistent interrogation rather than as a voluntary exercise of his free will. 384 U.S. 436, 499. This conclusion is buttressed by petitioner's testimony that he confessed because the police promised to stop questioning him if he gave a statement. (Vol. II, C. 428, 469)

The appellate court also emphasized that between the time of his arrest and his written confession, Mr. James was advised of his rights six times and signed four written waivers. 402 N.E.2d 936, 940-941. However, the effect of repeating the warnings was diluted because the police had already ignored petitioner's attempt to exercise his rights.

Only a few minutes after petitioner was first advised of his rights and requested counsel, officers readvised him of his rights and began interrogation. This action, taken with complete knowledge that petitioner had just requested an attorney, constituted an obvious and egregious violation of Miranda. Where a request for counsel is immediately greeted by repetition of the Miranda warnings, the implication to the accused is that the police do not intend to honor his attempt to exercise those rights. Rather than protecting the accused from the coercive atmosphere of custodial interrogation, repetition of the Miranda warnings after a request for counsel increases the pressure on the accused because he must realize that, no matter what rights he possesses, the police are in a position to control whether his rights are respected. An assertive and forceful person may insist that police honor his prior request. A less assertive suspect might conclude, as did the petitioner here, that the warnings are meaningless and that he has no alternative except to talk to police.

In addition, because the waiver forms which Mr. James

initialed were ambiguous, and because the police did not at any time acknowledge the prior request or ask Mr. James directly whether he wanted to see an attorney, the waiver forms are insufficient to establish a voluntary retraction of the prior request. The form contains three sentences which advise the defendant that he has the right to remain silent, that anything he says will be used against him, that he has the right to consult an attorney, have an attorney present during questioning, and to have an attorney appointed if he is indigent. At the end of each line the accused is to place his initials if he understands that he has those rights. (Vol. IV, R. 419) (See Appendix D)

The form contains only two sentences from which waiver of the right to counsel can be inferred:

> Knowing and understanding these rights, I waive them at this time and agree to talk with the officer(s); knowing and understanding also that if I desire to stop talking to the officer(s) at any time, I am free to do so. _____ (subject's initials)
>
> I make this waiver freely and voluntarily without any force, promises or threats. (subject's initials)
>
> (Vol. II, R. 419) (See Appendix D)

Where a request for counsel has been made, it is only reasonable to require that a retraction of that request be at least as explicit as the request itself. The petitioner's statement, "[I] would like to talk to an attorney," closely followed by the statement, "I know, understand, and waive my rights," at best indicates confusion. The officers made no attempt to eliminate that confusion, even though the logical reaction to the inconsistent statements would have been to clarify whether Mr. James wanted to talk to an attorney. The record suggests, to the contrary, that the officers carefully avoided taking any action which might have led Mr. James to repeat his request. Thus, the officers did not

acknowledge that they knew of the prior request, and did not ask Mr. James whether he still wanted to see an attorney. Mr. James was never directly asked, either by the officers or by the statements on the waiver form, whether he was willing to talk to the officers without having an attorney present. Finally, of course, the officers did not in any way intimate that a second attempt by Mr. James to exercise his right to counsel might be honored.

The appellate court also stated that petitioner's request for counsel concerned an offense different from the offense involved in this appeal. 402 N.E.2d 936, 941. However, the record does not support this assertion. The defendant was charged with two related offenses, murder and attempt murder. When petitioner requested to talk to an attorney, he was in a squad car on the way to the police station. Although Mr. James later asked about the victim in the attempt murder case, neither case had been mentioned at the time Mr. James asked for counsel. (Vol. II, C. 215-221)

In addition, when interrogation was renewed at the police station, the police did not maintain a strict dichotomy between the offenses. The first waiver form which Mr. James was asked to sign carried the notation "Murder - Attempt Murder." (Vol. II, C. 442) In addition, the officers did not strictly limit their interrogation to one offense or the other. In Michigan v. Mosley, by contrast, a critical factor in this Court's analysis was that the subsequent interrogation was restricted to an offense which had not been included in the first interrogation. 423 U.S. 96, 106.

Furthermore, the police made no effort to assure Mr. James that a request for counsel on the second offense would

be honored. In order for a waiver on the second offense to be valid, the defendant must know that although the police refused his prior request, they are willing to honor a request on the second offense. Unless the defendant is made aware of this, the intimidating effect of the earlier refusal may inhibit a second request.

This case is similar to Westover v. United States, another companion case of Miranda. Westover was arrested and, without being advised of his rights, was interrogated for several hours by local authorities. After the local authorities completed their interrogation, federal agents advised Westover of his rights and questioned him about completely different offenses. In reversing federal convictions which relied upon confessions which Westover made to the federal agents, this Court held:

> Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning.
>
> 384 U.S. 436, 496.

In this case, the offenses were not only related, but some of the interrogations dealt with both cases. In addition, the officers involved were all from a single jurisdiction. As in Westover, the impact upon the petitioner was that of continuous interrogation concerning more than one offense.

Two other points mentioned by the appellate court deserve mention. First, the lower court stated that Investigator Hartshorn had testified that petitioner "agreed to answer the officer's questions without an attorney being present," implying that Mr. James affirmatively stated that he was willing to be questioned without counsel. 402 N.E.2d

936, 941. When taken in context, however, the record is clear that Mr. James made no such statement.

The testimony to which the lower court referred was:

> Q. [by prosecutor]: After the completion of the interrogation form -- the first interrogation form on the 17th, marked as People's Exhibit No. 4 -- did Mr. James agree to answer your questions or to talk with you without an attorney being present?
>
> A. Yes, he did.
>
> (Vol. II, C. 266-267)

As is apparent from this question, Hartshorn did not testify that petitioner stated his willingness to proceed without counsel, but instead agreed with the premise of the prosecutor's question. By contrast, when directly asked whether petitioner stated that he did not want to consult an attorney, Hartshorn testified that the subject of speaking to counsel was never mentioned:

> Q. At that point when you first came into the room with Investigator Rollins, what, if anything, did Mr. James say concerning wanting to talk to an attorney before talking with you?
>
> A. He said nothing to us about an attorney.
>
> (Vol. II, C. 239)

Furthermore, Hartshorn later testified that Mr. James made no mention of counsel at any interrogation on either day:

> Q. During any period of time on the 17th when you were present with Mr. James, when, if ever, did he ask to have an attorney speak with him during, prior, or after any conversation with you?
>
> A. During my contact with Mr. James, neither on the 17th or the 18th, did he ever ask me if he could have an attorney, if he could call an attorney, or make any reference to any contact with an attorney.
>
> (Vol. II, C. 248)

It is obvious that, taken in context, the remark which the lower court cited did not refer to an express statement that Mr. James was willing to answer questions without the presence of counsel.

The final factors mentioned by the appellate court were that petitioner was twenty-six years old, was a high school graduate, was employed as an assistant manager of a shoe store, and had prior experience with the criminal justice system. 402 N.E.2d 936, 941. While these factors may have some value in determining whether petitioner was aware of his rights, they are hardly conclusive on the question of waiver. This is not a case where the warnings were confusing or misleading and where the intelligence and experience of the accused might indicate that he understood the warnings. Instead, the issue here is whether the record affirmatively establishes that, despite a deliberate refusal of petitioner's request for counsel, petitioner's confession was the result of a voluntary and knowing decision to withdraw that request. In the inherently coercive atmosphere of a police interrogation room, even an intelligent man might assume that refusal of a request for counsel indicated unwillingness to permit one to exercise his rights. In the absence of some indication that petitioner's prior experience involved a refusal by police to honor his constitutional rights, the fact that he had been questioned in the past is of little importance.

The most critical factor to be considered in determining whether petitioner withdrew his request for counsel is not mentioned in the appellate court's opinion. In Michigan v. Mosley, this Court stressed that although the accused had been questioned about an unrelated offense, the police had "scrupulously honored" his decision to cut off questioning:

> This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind.
>
> 423 U.S. 96, 105-106.

In this case, by contrast, Investigator Hartshorn had complete knowledge of petitioner's request for counsel, but ignored that request and renewed interrogation. After interrogation was resumed, the officers failed to ask petitioner if he wanted counsel, to indicate that they knew of the prior request, or to acknowledge that they would honor a repeated request. Furthermore, the police failed to provide a court hearing scheduled for the afternoon of May 18, several hours before Mr. James confessed, although counsel could have been appointed at the hearing. Not only did the officers fail to "scrupulously honor" petitioner's exercise of his Fifth Amendment rights, but examination of the record compels the conclusion that police deliberately ignored petitioner's request and set about obtaining a confession. Should this Court find that a request for counsel may be withdrawn where the accused is not permitted to consult with counsel, it should nonetheless condemn the actions taken by police here.

Certiorari should be granted in this case so that this Court can clarify for lower courts the per se rule prohibiting interrogation after a request for counsel is made. In addition, should this Court find that the per se rule is no longer valid, it should establish standards by which the lower courts can determine whether a request for counsel has been knowingly and voluntarily withdrawn.

B.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER A QUESTION WHICH IT HAS NOT DECIDED: WHEN, IF EVER, INTERVENING EVENTS CURE A FAILURE TO HONOR A POST-ARREST REQUEST FOR COUNSEL SO THAT STATEMENTS OBTAINED IN VIOLATION OF MIRANDA V. ARIZONA ARE ADMISSIBLE.

Immediately after his arrest, petitioner said that he wanted to talk with counsel, and was told that he could do so at the police station. Despite knowing of the request, a different police officer readvised petitioner of his Miranda rights and renewed interrogation. Over the next twenty-eight hours, the police repeated the Miranda warnings and renewed interrogation five additional times. At the fifth interrogation, which occurred approximately twenty-four hours after the request for counsel, petitioner made an oral confession. At the sixth interrogation, which occurred approximately twenty-eight hours after counsel was requested, petitioner made a written confession.

Despite the failure of police to honor petitioner's request for counsel, the Appellate Court of Illinois, Fourth Judicial District, held that the confessions were admissible. The court held that the effect of the refusal to honor petitioner's request was "dissipated" by intervening events so that the confessions were voluntarily made and were thus admissible. Among the factors relied upon by the appellate court were that nearly twenty-four hours lapsed between the request for counsel and petitioner's first confession; petitioner was advised of his rights five times after his request for counsel, and signed four written waiver forms; petitioner was eventually allowed to speak to his relatives, his parole officer, and a friend; petitioner had a high school education; and petitioner had been questioned by police officers in the past. 402 N.E.2d 936, 940-941.

To support its conclusion that a Miranda violation can be cured by intervening events, the appellate court cited only People v. White, 61 Ill.2d 288, 335 N.E.2d 457 (1975), cert. denied 424 U.S. 970, a decision of the Illinois Supreme Court.[1] People v. White, in turn, rested solely upon this Court's opinion in Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254 (1975), a Fourth Amendment case which held that giving Miranda warnings does not necessarily break the causal connection between an illegal search and subsequent statements. The opinion in Brown v. Illinois does not refer to the proposition for which the case was utilized in People v. White - that a failure to honor a valid request for counsel can be cured by subsequent events. Nor has this Court ever considered the validity of the White rule. Certiorari should be granted so that this Court may consider whether the rule adopted by the Illinois Supreme Court in People v. White, and relied upon by the lower court in the case at bar, rests upon sound constitutional principles.

In Brown v. Illinois, the defendant was arrested illegally, taken to the police station, and given the warnings required by Miranda v. Arizona. He then made two inculpatory statements. Brown's motion to suppress his statements was denied, and he was convicted at a trial in which evidence of both statements was introduced.

On appeal, the Illinois Supreme Court held that Brown had been arrested illegally, but adopted a per se rule that the Miranda warnings in and of themselves broke the causal chain so that any subsequent statement, even if induced by

---

[1] The conviction involved in People v. White has been the subject of several federal court decisions. The latest opinion in this series is White v. Finkbeiner, 611 F.2d 186 (1979), which is now pending on a Petition for Certiorari before this Court (No. 79-6001).

the continuing effects of unconstitutional custody, could not be suppressed as the fruit of the illegal arrest. See 442 U.S. 590, 596-597.

On appeal, this Court held that the Miranda warnings were a factor in determining whether the taint of an illegal arrest had been dissipated, but did not, in and of themselves, invariably break the causal chain. Not only did this Court fail to consider any possible Fifth Amendment application of Brown, but it specifically limited its holding to the facts. See 422 U.S. 590, 605.

Brown presented a totally different factual situation from either People v. White or the case at bar. In Brown, the only police illegality was the arrest of the defendant without a warrant and without probable cause. The only issue presented was whether subsequent statements were fruits of the illegal arrest. Although the giving of Miranda warnings was one of the events between the arrest and the statements, Brown was not a Fifth Amendment case because there was no Fifth Amendment violation.

People v. White and the case at bar do not involve the Fourth Amendment. The illegality at issue in these cases involves the Fifth Amendment - a failure by police to honor a request for counsel. Because Brown v. Illinois did not purport to discuss this issue, and indeed was specifically limited to one particular aspect of Fourth Amendment law, the Illinois Supreme Court erred by relying upon Brown in People v. White. Similarly, the appellate court erred by relying upon White in the case at bar.

In Miranda, this Court adopted a per se rule tnat where a suspect requests the assistance of counsel, the interrogation must cease until an attorney is present. 384 U.S. 436, 474. In Brown, this Court held that a per se rule was not

necessary to protect the interests served by the Fourth Amendment. On one hand, this Court held, a per se rule that Miranda warnings removed the taint of an illegal arrest would encourage violations of the Fourth Amendment because any illegality could be cured by giving the warnings. 422 U.S. 590, 602-603. On the other hand, this Court also rejected a per se rule that Miranda warnings could never cure an illegal search, holding that an admittedly illegal arrest might have no effect upon the suspect's decision to make a statement.

Under the Fifth Amendment, different considerations are involved. The per se rule of Miranda prohibiting all questioning after counsel is requested:

> was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. . . .[T]he lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts. For this reason, the Court fashioned in Miranda the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease.
>
> Fare v. Michael C., 442 U.S. 707, 719, 61 L.Ed.2d 197, 99 S.Ct. 2560 (1979)

The Miranda warnings are intended to protect Fifth Amendment rights against the "compulsion inherent in custodial surroundings." Brown v. Illinois, 422 U.S. 590, 600. The warnings cannot serve this purpose if repeating them is allowed to cure a refusal to honor exercise of those rights. This Court's conclusion in Miranda that a suspect who is advised of his Fifth Amendment rights will be able to resist compulsion necessarily rests on the assumption that a

suspect who is aware of his rights has an option to refuse to talk to police. This premise is totally destroyed where police are not obligated to conscientiously honor a defendant's exercise of his Fifth Amendment rights.

Where a request for counsel is greeted by a repetition of the Miranda warnings, the implication to the accused is that the police will not honor his request and that it is useless to ask again. Therefore, the warnings not only fail to reduce the effect of coercion, but may increase that effect because the suspect might conclude that even though he has certain rights, the police will not permit him to exercise them.

The case at bar demonstrates the danger of any rule permitting a defendant's statement to be introduced after he has attempted to exercise his Fifth Amendment rights. Only minutes after petitioner requested counsel, he was readvised of his rights and questioned concerning the offense. Investigator Hartshorn, who conducted the interrogation, and who supervised five additional interrogations over the following twenty-eight hours, testified that he knew that petitioner had just requested counsel. (Vol. II, C. 236) Hartshorn gave no explanation for his decision to renew interrogation, and the record does not reflect any extenuating circumstances which could possibly justify renewed questioning. Under the circumstances, the conclusion is unavoidable that the only purpose for readvising petitioner of his rights was the hope that he would make a statement without repeating his request for counsel.

On the other hand, where police know that a suspect's request for counsel must be honored, and that any statement obtained without permitting consultation with counsel will be suppressed, there is little incentive to "try again" to see if the suspect will fail to repeat his request.

However, should this Court find that under certain circumstances, intervening circumstances may remove the "taint" of a refusal of a request to consult with counsel, the statements in the case at bar should be suppressed nonetheless. In Brown v. Illinois, this Court mentioned four factors which should be considered in determining whether a confession was obtained by exploitation of an illegal arrest. The same factors are relevant to a determination of whether a statement was obtained by exploiting a refusal to honor a request for counsel. As applied to this question, the factors in Brown are whether Miranda warnings were repeated, the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, most importantly, the purpose and flagrancy of police misconduct. Brown v. Illinois, 422 U.S. 590, 603-604.

In the case at bar, application of these factors illustrates that petitioner's confession cannot possibly be considered a free and voluntary act independent of the failure to honor his request for counsel. Although Miranda warnings were repeated, the very act of repeating Miranda warnings after refusing to honor defendant's prior request for counsel is inherently coercive because the defendant is led to believe that the police do not intend to honor his rights. If repeated warnings can ever break the link between a refusal to honor a request for counsel and a subsequent statement, the police must be required to acknowledge that the request has been made and that the officers are willing to honor it. An explicit withdrawal of the request following this explanation may be sufficient to break the causal chain. However, it cannot be presumed that the statements were voluntarily made merely because, after refusing the request for counsel, the officers repeated the Miranda warnings.

The appellate court also stressed the lapse of time between Mr. James's request for counsel and his confessions. Although twenty-four hours elapsed, it is not merely the amount of time which is significant, but also the precise conditions of the detention. See Rawlings v. Kentucky, ___U.S. ___, 65 L.Ed.2d 633, 643, 100 S.Ct. ____ (1980) Here, petitioner was not left alone for twenty-four hours. Nor was he exposed to a "congenial atmosphere" as in Rawlings. Instead, he was interrogated five separate times before making the first confession. In addition, Mr. James testified that one of the officers said that it was necessary to question him "30 times" because his answers "didn't sound right" (Vol. II, C. 417), that he would be questioned until the officers "found out something" (Vol. II, C. 425), and that he could not receive a larger sentence on the murder than he would receive on the related attempt murder case (Vol. II, C. 418). Mr. James was also told that one of the police officers knew that Mr. James was guilty, would see that the victim's daughters found out, and would work on the case while Mr. James was in prison on a parole violation so that he would be arrested when he was released from prison. (Vol. II, R. 425) After taking a polygraph examination, Mr. James was told by one of the officers that "even his untrained eye could see" that Mr. James had lied. (Vol. II, C. 426) Finally, just before petitioner made his first confession, he was told by police that the questioning would stop if a statement was made. (Vol. II, C. 428) All of these factors are relevant to determine whether petitioner's confessions were truly a product of his free will or were obtained by exploitation of the refusal to honor his request for counsel.

If the passage of time under these conditions is held to cure the failure to honor a request for counsel, the protections of Miranda v. Arizona will be reduced to a mere formality. The police could insulate from attack any Miranda violation by detaining the suspect for a period of time, even though that period was consumed by repeated interrogations and even though the defendant never expressed a desire to talk to officers without consulting an attorney.

In finding that petitioner changed his mind voluntarily and decided to talk, the appellate court emphasized that petitioner was permitted to meet with his relatives, his parole officer, and a friend. However, several hours and two separate interrogations occurred between defendant's request for counsel and the time he was allowed to speak to anyone except police officers. Because his request for counsel had been ignored, Mr. James may well have decided that the police had no intention of permitting him to see an attorney under any circumstances.

In addition, this Court should consider the testimony of the witnesses who saw Mr. James on the evening of his arrest. Petitioner's stepfather testified that Mr. James said he had been held for seven or eight hours in a place where he could not do anything except talk to police. (Vol. II, C. 384-385) The stepfather testified that Mr. James looked tired, bloody, and dirty. During the conversation with his stepfather, Mr. James slumped over the table and had difficulty speaking. (Vol. II, C. 387-388)

The other person to see Mr. James on the day of his arrest was his mother, who testified that Mr. James said that he did not want to talk to the police but had been forced to do so. (Vol. II, C. 391-392) The mother also testified that petitioner's face was scratched and looked alternatively flushed and pale. She testified that Mr. James was crying, clenching his hands, and speaking in a low voice. (Vol. II, C. 406-407)

The fact that petitioner was permitted to see other persons on the following day is even less probative. At the time petitioner spoke to his father and Carolyn Burris, he had been held for more than twenty-four hours and had just made an oral confession. In addition, petitioner's father, who was the first person other than police officers to talk to him the day following his arrest, told Mr. James that the police had made him promise to give a full statement of everything which was said during their conversation.

At most, the record in this case shows only after his request for counsel was refused, petitioner failed to repeat that request. The burden is on the prosecution to establish that petitioner's confessions were not obtained by exploitation of the Miranda violation. Brown v. Illinois, 422 U.S. 590, 604. The record contains no indication that petitioner ever affirmatively stated that he no longer wanted an attorney or that he wanted to talk without an attorney. Even the four waiver forms, upon which the appellate court placed primary emphasis, did not contain an express statement that petitioner wished to talk to officers without an attorney.

In Brown, this Court held that the most important factor to be considered was the purpose and flagrancy of the police misconduct. 422 U.S. 590, 604. In the case at bar, there can be little doubt that the failure to honor petitioner's request for counsel was a deliberate attempt to obtain a statement despite that request. Investigator Hartshorn, who conducted three of the six interrogations and who ordered other officers to conduct the other three, testified that he was aware of petitioner's request for counsel before the first interrogation began. Hartshorn gave no explanation for his decision to renew interrogation, and the record suggests no extenuating circumstances which could possibly justify that decision. The failure of any of

the officers to acknowledge that petitioner had requested counsel or to even ask petitioner directly whether he wanted to consult an attorney compels the conclusion that the decision to reinterrogate was a deliberate attempt to thwart petitioner's exercise of his Fifth Amendment rights. The circumstances under which Mr. James was detained and interrogated preclude a finding that his confessions were a product of his free will, and strongly suggest that the police eventually obtained petitioner's statements only by exploiting their refusal to honor his request for counsel.

VI.

CONCLUSION

For the foregoing reasons, Thomas Ray James, petitioner, respectfully requests that a writ of certiorari be issued to the Appellate Court of Illinois, Fourth Judicial District.

Respectfully submitted,

DAVID P. BERGSCHNEIDER
Assistant Defender
Office of the State Appellate Defender
Fourth Judicial District
300 East Monroe, Suite 102
Springfield, IL 62701
(217) 782-3654

COUNSEL FOR PETITIONER

DANIEL D. YUHAS
Deputy Defender

OF COUNSEL

APPENDIX A

82 Ill.App.3d 551
37 Ill.Dec. 934

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Thomas Ray JAMES, Defendant-Appellant.

No. 15485.

Appellate Court of Illinois, Fourth District.

March 28, 1980.

Rehearing Denied April 28, 1980.

Defendant was convicted in the Circuit Court, Vermilion County, Ralph S. Pearman, J., of murder and he appealed. The Appellate Court, Mills, P. J., held that: (1) defendant's statement to arresting officers that he would like to talk to an attorney was sufficient to assert his right to counsel; (2) evidence established that defendant, who had requested counsel, had subsequently retracted his request and waived his right to counsel before confessing; (3) where State contended that motive for defendant's conduct was desire to develop a close relationship with a woman and to prevent anyone else from developing such a relationship, evidence which tended to show defendant's attempts to ingratiate himself with woman was relevant to show that he may have been hostile toward the victim who had stayed at woman's home until 11 p. m. on the day preceding victim's death and the evidence was not inadmissible simply because it may also have tended to prejudice the defendant.

Affirmed.

1. Criminal Law ⇐412.2(1)

Defendant's statement to arresting officers that he would like to talk to an attorney was sufficient to assert his right to counsel.

2. Criminal Law ⇐531(3)

Evidence established that defendant, who had requested counsel, subsequently retracted his request and waived his right to counsel before confessing.

3. Homicide ⇐166(3)

In murder case in which State contended that motive for defendant's conduct was desire to develop close relationship with a woman and to prevent anyone else from developing such relationship, evidence which tended to show defendant's attempts to ingratiate himself with woman was relevant to show that he may have been hostile toward the victim who had stayed at woman's home until 11 p. m. on the day preceding his death and that evidence was not inadmissible simply because it may have tended to prejudice the defendant.

4. Homicide ⇐174(8)

Where note signed with nickname was found in kitchen in which victim's body was discovered and the note had been left at victim's residence on day before the killing by college classmate of victim, evidence concerning defendant's reference to that nickname in his phone conversation with another person following the killing was admissible as circumstantial evidence of defendant's presence at victim's residence at time of the shooting and defendant's attempt to explain the use of the nickname as referring to another person did not bar admission of the evidence.

Richard J. Wilson, Deputy State Appellate Defender, David Bergschneider, Asst. State Appellate Defender, Springfield, for defendant-appellant.

Thomas J. Fahey, State's Atty., Danville, Gary J. Anderson, Acting Deputy Director, State's Attys. Appellate Service Commission, Robert J. Biderman, Staff Atty., Springfield, for plaintiff-appellee.

MILLS, Presiding Justice:

Murder—40 years.

Issue: *Miranda*.

We affirm.

James was found guilty by a jury of murder and armed violence. Judgment was

entered only on the murder charge and a sentence of 40 years' imprisonment was imposed. (This sentence is to be served consecutive to a 30-year sentence imposed on an attempt murder conviction which is now on appeal to this court in Case Number 15306.) Defendant challenges his murder conviction, arguing that the trial court erred in denying a motion to suppress his confession and further erred in admitting evidence as to certain telephone calls that defendant made after the victim's death.

SUPPRESSION HEARING

Prior to trial, defendant moved to suppress certain statements he made to police officers following his arrest. A review of the evidence presented at the suppression hearing, where Judge Paul M. Wright presided, shows that defendant was arrested in a rural area of Vermilion County at approximately 5 p. m. on May 17, 1978. During the evening hours of the day before, the defendant had been involved in an altercation with Samuel Cartwright and defendant knew the police were looking for him in connection with this incident. When the arresting officer, Terry Carey, arrived at defendant's location, defendant held out his hands, and said, "I did it." Defendant was then searched, handcuffed, and placed in Carey's squad car. Carey did not question defendant other than to ask his name.

While en route to the Public Safety Building in Danville, Officer Carey radioed headquarters to request that the sheriff and an investigator meet him. Defendant asked Carey if he would be allowed to make a phone call at the jail to which Carey responded affirmatively. About a minute later, defendant requested that Carey inform him of his rights and Carey did so. Shortly thereafter, defendant asked if he could make a second phone call if necessary and Carey said he could. After another minute or two passed, defendant said that "he would like to talk to an attorney." Carey told him he would be allowed to do so. Carey did not attempt to question defendant during the trip to Danville.

Later, while still traveling in Carey's squad car, defendant asked how seriously the man was injured. Carey responded, "Who?" Defendant then told Carey he was referring to the incident the night before and Carey did not respond. Defendant then asked how long he would get and Carey asked, "For what?" Defendant again stated he was referring to the incident on the previous night. Carey did not reply but once again told defendant he would be allowed to use a phone at police headquarters.

When they arrived at police headquarters, Carey told police investigator William Hartshorn that defendant had been advised of his rights, had asked to speak to an attorney and to use the telephone. Carey also told Hartshorn that he had advised defendant that he could do so. During this conversation, defendant was in an interview room in the Public Safety Building.

Shortly after his conversation with Carey, Hartshorn and investigator Larry Rollins went to the interview room to talk to the defendant. Defendant requested the presence of a certain police officer he was familiar with and this officer was summoned to the room.

At approximately 6:20 p. m.—one hour and 20 minutes after his arrest—the defendant was advised of his rights by investigators Hartshorn and Rollins. He initialed a written form to indicate he understood his rights and then (according to Hartshorn) agreed to answer questions without the presence of an attorney. Hartshorn and Rollins then questioned the defendant about the Cartwright incident until 8:55 p. m. During this period, however, the questioning was interrupted several times. At 6:58 p. m. it was interrupted until 7:24 p. m. and during this time the defendant was served supper. The interview again halted from 8:21 p. m. until 8:53 p. m. At the end of this break, defendant asked to make a phone call and the officers took him to another room where he called his employer. After this phone call, the defendant was asked if he wanted to make another call and he declined the offer. (The defendant

did not ask his employer to contact an attorney but he did ask the officers when he would be taken to court. This question came after defendant was overheard discussing the possibility of bail with his employer. Defendant was told he would be taken to court at 1:30 p. m. on the following day.)

From 9:05 until 11 p. m. defendant was questioned by police officers Robert LeConte and Gene Woodward regarding the shooting death of David Holler which occurred on May 8, 1978. Prior to this interview, defendant was again advised of his rights and he signed another waiver form. At 11 p. m. he was allowed to speak to his mother and stepfather. They were together until 11:50 p. m. when defendant was placed in a cell. The statements which defendant had made to the officers on May 17 were basically exculpatory.

Investigator Rollins testified that at 11 a. m. the following day, May 18, he and Hartshorn went to defendant's cell and asked him if he wanted to talk with the officers. Defendant agreed and he was then taken to the interview room where he was once more advised of his *Miranda* rights and again waived them. As was previously done, each paragraph of the form was read to defendant and he was asked if he understood his rights or had any questions. He responded that he understood the form and had no questions. After this procedure was concluded, defendant was questioned about the death of David Holler. Hartshorn and Rollins concluded this questioning at 1 p. m.

The defendant was served lunch and met with his parole officer from 1 until 2 p. m. Defendant testified that the investigators had already told him that his parole had been revoked but they denied this. They testified that during the previous questioning defendant had expressed concern about his parole and they decided to call the parole officer to talk to defendant about this.

From 2 until 2:55 p. m. defendant was in the interview room by himself awaiting the arrival of a polygraph examiner. After a fifth repetition of the *Miranda* warnings and another waiver of these rights by defendant, a polygraph examination was conducted. It concluded at 4 p. m. and Hartshorn and Rollins then questioned defendant until 4:25 p. m. Investigators LeConte and Woodward questioned the defendant from 4:30 until 6:05 p. m. and during this session the defendant, for the first time, admitted knowing—and shooting—David Holler.

At 6:10 p. m. defendant was served dinner and then spoke with his father from 7:30 until 8:10 p. m. Carolyn Burris, an acquaintance defendant had asked to speak with, met with him from 8:30 until about 9 p. m.

Investigators LeConte and Woodward, after again advising defendant of his rights and obtaining a waiver, took a written statement from about 9 until 10:45 p. m. According to this statement, the defendant had seen David Holler on May 7 on a road near Carolyn Burris' home. He later went to Holler's home and, at Holler's insistence, killed him. During this questioning, defendant also drew several sketches of the crime scene. After the questioning was completed, defendant met with his mother until 11:45 p. m.

Each of the individuals who talked to the defendant on May 17 and 18 testified that he did not tell them he had been refused an attorney. Defendant's parents testified that he looked tired and pale and had difficulty speaking.

Defendant is a 26-year-old man and was the assistant manager of a Hills Brothers shoe store at the time of his arrest. He admitted that he had been questioned by police on previous occasions and further testified that when he arrived at the Public Safety Building on May 17 he asked to make a phone call and to be taken to a hospital because he was cut and bruised from his altercation with Cartwright and chilled from being outside since 5 a. m. May 16. He also testified that he had no sleep since that time. Investigator Hartshorn testified that defendant did not make such requests and, in fact, refused an offer of medical treatment.

Defendant admitted that on May 17 he agreed to talk to the officers about the Cartwright incident. He testified that later that evening he told the officers that he saw no point in talking further with them but they responded that it was necessary to ask him each question 30 times. Defendant denied that the officers allowed him to use the phone to call his employer and stated that he did not recall speaking with his mother or stepfather on May 17.

According to defendant, he gave the police the statement and drew the sketches of the Holler residence because he wanted the questioning to end. He also testified that the police had threatened to continue working on the Holler case and see that defendant was arrested when he was released from prison. The officers denied this. They testified that no promises or threats were made to defendant. Defendant admitted that he did not again request an attorney but explained that this was because he had been told that an attorney could not help him. He agreed to take the polygraph examination only after the officers told him that the questioning would stop if he passed it.

Defendant further testified that on several occasions he expressed a desire to stop the interview but the police persisted. When told that the questioning would stop if he gave a statement, defendant agreed to do so. He could not tolerate returning to prison on a parole violation knowing the State was attempting to convict him on another charge. He did, however, admit that the statement was not forced.

At the conclusion of the suppression hearing, the trial court denied defendant's motion to suppress, ruling that defendant's initial statement to Officer Carey was merely an inquiry or request for information and not a request for counsel. The court found that defendant agreed to talk to the officers and did so knowingly and voluntarily.

Defendant does not argue that this case presents an issue as to the voluntariness of his confession but contends that the police violated his *Miranda* rights by refusing his request for an attorney. He argues that the State failed to show that he subsequently withdrew his request for counsel and therefore his statements were inadmissible because they were the fruits of illegal police conduct.

We disagree.

Whether a defendant's statements to police officers following his arrest were sufficient to constitute a request for counsel has previously been considered by the courts of this state. (*People v. Morrissey* (1977), 49 Ill.App.3d 622, 7 Ill.Dec. 293, 364 N.E.2d 454; *People v. Rafac* (1977), 51 Ill.App.3d 1, 7 Ill.Dec. 700, 364 N.E.2d 991; *People v. Starling* (1978), 64 Ill.App.3d 671, 21 Ill.Dec. 490, 381 N.E.2d 817.) The present case is readily distinguishable from any of the cited cases because here defendant's statement was in the most unambiguous language. The trial court, however, looked to the circumstances surrounding defendant's request (including the numerous other questions propounded to the arresting officer), and concluded that defendant was merely seeking information as to whether he would be allowed an attorney if he so desired. The court did not believe that defendant's statement that "he would like to talk to an attorney" was sufficient to invoke his right to the presence of an attorney during custodial interrogation. See *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

[1] Contrary to the trial court's ruling, we believe defendant's statement to Officer Carey while en route to the Public Safety Building was sufficient to assert his right to counsel. Here, defendant's statement was more than the mere suggestion that perhaps he should speak to an attorney which was held to be an insufficient indication of a desire to consult with counsel in *People v. Krueger* (1979), 74 Ill.App.3d 881, 30 Ill.Dec. 936, 393 N.E.2d 1283. Defendant's request was in the most unambiguous and unequivocal of terms. And it is not without significance that the arresting officer interpreted the statement as a request for counsel. *Maglio v. Jago* (1978), 580 F.2d 202.

A resolution of whether defendant requested counsel does not, however, terminate our inquiry into the question of whether defendant's confession was properly received in evidence. While some courts apparently hold that the right to the assistance of counsel can never be waived by a suspect whose initial request for an attorney has not been honored (*United States ex rel. Williams v. Twomey*, (7th Cir. 1972), 467 F.2d 1248), we believe the question is whether the State has met the "heavy burden" of showing that the defendant knowingly and intelligently waived his right to retained or appointed counsel. *People v. Washington* (1977), 68 Ill.2d 186, 11 Ill.Dec. 603, 369 N.E.2d 57, *cert. denied* (1978), 435 U.S. 981, 98 S.Ct. 1631, 56 L.Ed.2d 72; see also *White v. Finkbeiner* (7th Cir. 1978), 570 F.2d 194 (where the court acknowledged that the State's request to overrule or distinguish *Williams* was an argument not to be lightly dismissed).

[2] The defendant argues that the State failed to meet this heavy burden and that his statements were inadmissible. Because of its ruling that defendant did not request counsel, the trial court did not rule that the defendant had voluntarily retracted his request. Defendant argues that this court should reach that question and rule that defendant did not withdraw the request. The court did rule that defendant agreed to talk to the officers and did so knowingly and voluntarily. The court therefore found that defendant's action in signing the waiver form presented by the officers and his confession were the result of voluntary and knowing acts. Implicit in that finding is a waiver by the defendant of his right to counsel. And, that decision is not against the manifest weight of the evidence. (*People v. Medina* (1978), 71 Ill.2d 254, 16 Ill. Dec. 447, 375 N.E.2d 78.) While testifying at the suppression hearing, defendant admitted that he agreed to talk to the officers on May 17 and further testified that the statement he gave to them on May 18 was not the result of force. His testimony that he gave a statement only to stop the questioning was apparently rejected by the trial court. The evidence shows that subsequent to his request for counsel he agreed to talk to the officers without an attorney being present and he signed four forms which stated that he waived his *Miranda* rights. We believe that this evidence clearly shows that defendant retracted his request for counsel.

The situation presented here is not unlike that presented to our supreme court in *People v. White* (1975), 61 Ill.2d 288, 335 N.E.2d 457, *cert. denied* (1976), 424 U.S. 970, 96 S.Ct. 1469, 47 L.Ed.2d 738, where the court ruled that the effect of the procedural violation of *Miranda* was sufficiently dissipated so that the defendant's confession was voluntary and, therefore, properly received in evidence. In *White*, the police failed to furnish the defendant (a borderline retardate) with an attorney on the morning of his arrest on an unrelated offense. He was questioned later that day and also during the morning and afternoon of the following day. On each of these three occasions he was advised of his rights. With respect to the offense involved in the appeal, the defendant was not questioned until the third day and then only after receiving the full *Miranda* warnings. The supreme court affirmed his conviction because the effect of failing to provide him with counsel on the morning of his arrest was sufficiently dissipated by the time of his confession during the morning of the second day following the arrest. Among the factors discussed by the court in *White* were the lapse of time between the violation and the confession, the repeated admonitions, the fact it was not the first time the defendant had been charged with a crime, and that the subsequent waiver of the right to counsel occurred during questioning about an offense unrelated to the offense for which the defendant invoked the right.

Similarly, here defendant was advised of his rights six times and signed four different written waivers of those rights between the time of his arrest at approximately 5 p. m. on May 17 and his confession which was obtained sometime after 4:30 p. m. on May 18. While repeated admonitions alone will not always break the causal connection be-

tween the illegality and the confession (*White*), such factor is not to be disregarded. Not only did defendant sign the four waiver forms but, according to investigator Hartshorn's testimony, defendant agreed to answer the officer's questions without an attorney being present.

Other factors affecting the admissibility of defendant's confession include the passage of nearly 24 hours between the violation of *Miranda* and the statement sought to be suppressed. Thus, the interrogation which produced the confession did not immediately follow the request for counsel and during the interim defendant was allowed numerous breaks, including an 11-hour period where he was allowed to sleep. He was also allowed to meet with his mother, father, stepfather, Carolyn Burris, and his parole officer. According to the police officer's testimony, defendant's request to use the telephone was granted and he declined an offer to make additional calls. (See *People v. Smith* (1969), 108 Ill.App.2d 172, 246 N.E.2d 689, *cert. denied* (1970), 397 U.S. 1001, 90 S.Ct. 1150, 25 L.Ed.2d 412.) We also note that unlike the defendant who was a borderline retardate in *White*, this defendant was 26 years old, had a high school education, and was the assistant manager of a Hills Brothers shoe store. At the time of his arrest he was on parole and certainly no stranger to the criminal justice system. He admitted that he had been questioned by police officers prior to this incident.

Furthermore, an examination of the circumstances surrounding defendant's request for counsel shows that it was made at a time when defendant was expressing concern about an offense different from the offense involved in this appeal. Under the circumstances of this case, and contrary to defendant's assertions, we believe that the record clearly shows that defendant knowingly and voluntarily withdrew his request for counsel. Additionally, we conclude that the effect of the procedural violation of *Miranda* was sufficiently dissipated so that defendant's statements were voluntary and properly admitted.

THE TRIAL

The State attempted to show defendant's motive for taking the life of David Holler by presenting evidence that for some time prior to the death of Holler the defendant had attempted to develop a close personal relationship with Carolyn Burris. The defendant had visited her home on several occasions and as he was concluding one of these visits he suddenly kissed Ms. Burris. The following day Ms. Burris went to the shoe store where defendant was employed to tell him that she did not want to become romantically involved. Defendant put his arm around her and she told that she had a boyfriend whom she did not want to lose.

Burris' statements to the defendant did not halt his visits to her home and on May 6 he unexpectedly arrived there at about 10:30 p. m. Burris, who had been asleep, told defendant that she had to get up early the next day and that he should not come by her house unless he first telephoned her.

On Sunday, May 7, the victim (David Holler) visited Burris at her place of employment to return some materials he had borrowed. He accepted an invitation to her home where he played chess with her children, ate supper, and left at about 11 p. m.

David Holler died between 3 and 7 a. m. on May 8, 1978, from gunshot wounds to his head. His body was discovered in the kitchen of his home by his parents on the same date. A note signed "Debbie" was also found in the kitchen on a table. It had been left at Holler's residence on May 7 by Debbie Jones, a classmate of Holler's at a local junior college. She had stopped by Holler's home to return some items and when she discovered he was not at home she left the note.

Carolyn Burris learned of Holler's death on May 8 at about 5 p. m. The following day, after she talked to police, she called defendant to tell him that he would probably be questioned by them. Over defense objection, Burris testified that she received a phone call from defendant on May 15. In the ensuing conversation, defendant told her that he had been questioned by police

and that Burris was under investigation for murder. She also testified that the defendant told her that he would see that she did not go to jail.

Defendant testified that he told Burris that the police had no suspects and that he did not tell her the police had a good case of murder against her. He admitted that he told her that if she was in trouble, he would do whatever he could.

Testimony was also presented, over defense objection, which indicated that subsequent to Holler's murder defendant called Carolyn Burris' former husband. During the brief conversation, defendant mentioned the name "Debbie" to the former husband. Defendant later testified that he was referring to Carolyn Burris' youngest daughter.

Defendant now contends the trial court erred in admitting evidence of the phone calls which he made to Carolyn Burris and to her former husband. He argued that these phone calls were not relevant because they had no probative value. If they had any probative value, he contends it was outweighed by the prejudicial effect. Defendant claims that his credibility was an essential factor in his defense because he needed to convince the jury that his confession was false. During the phone call to Carolyn Burris, he allegedly made statements which were not supported by other evidence in the record and, defendant argues, the jury may have concluded that he lied when he told Burris that the police suspected her of committing the murder. In addition, defendant and Burris gave conflicting testimony concerning the content of this call and again defendant argues his credibility was adversely affected.

[3] We disagree with defendant's contentions. His phone call to Carolyn Burris was relevant (as the State contends) because it tends to support the State's theory that the motive for defendant's conduct was a desire to develop a close relationship with Burris and to prevent anyone else from developing such a relationship. Evidence is admissible if it fairly tends to prove the offense charged. Any circumstances may be put into evidence which tend to make the proposition at issue either more or less probable. (*People v. Galloway* (1963), 28 Ill.2d 355, 192 N.E.2d 370, *cert. denied* (1964), 376 U.S. 910, 84 S.Ct. 665, 11 L.Ed.2d 608.) The only evidence to connect the defendant to David Holler was Carolyn Burris. Certainly evidence which tended to show defendant's attempts to ingratiate himself with Burris was relevant to show that he may have experienced hostility toward the man who stayed at her home until 11 p. m. on the day preceding his death. This testimony was not inadmissible simply because it may also have had a tendency to prejudice the defendant. *People v. Hairston* (1970), 46 Ill.2d 348, 263 N.E.2d 840, *cert. denied* (1971), 402 U.S. 972, 91 S.Ct. 1658, 29 L.Ed.2d 136.

[4] The evidence concerning defendant's reference to "Debbie" in his phone conversation with Burris' former husband was offered by the State to establish defendant's presence at Holler's residence at the time of the shooting. While defendant's reference to "Debbie" did not conclusively prove his awareness of the note found at Holler's residence, the testimony was circumstantial evidence of defendant's presence at the scene and as such properly admissible. That defendant attempted to explain this as a reference to Burris' daughter did not bar admission of this evidence.

Finally, in his brief defendant argued that imposition of a consecutive sentence was error because the trial court's act in not imposing an extended term of imprisonment was tantamount to a conclusion that consecutive sentencing was not required to protect the public from further criminal conduct by the defendant. (*People v. Dawson* (1975), 30 Ill.App.3d 147, 332 N.E.2d 58.) During oral argument, however, defendant properly withdrew this argument on the basis of our supreme court's opinion in *People v. Snyder* (1979), 77 Ill.2d 459, 34 Ill.Dec. 127, 397 N.E.2d 799.

Affirmed.

CRAVEN and WEBBER, JJ., concur.

DB

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SPRINGFIELD 62701

Thomas R. Appleton, CLERK
TELEPHONE
AREA CODE 217
782-2586

DATE: April 28, 1980

RE: People v. James
General No. 15485
Vermilion 78-CF-127

TO COUNSEL:

The Court today denied the petition for rehearing in the above entitled cause.

The mandate of this Court will issue in 7 days to the Clerk of the Circuit Court unless an affidavit of intent to seek review in the Supreme Court [Rule 368(b)] is filed in this Court.

THOMAS R. APPLETON, Clerk
Appellate Court
Fourth District

TRA:pd

TO: Daniel D. Yuhas/David Bergschneider
Thomas J. Fahey
Gary J. Anderson

APPENDIX C

53474 SAD-Sprid.

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

September 29, 1980

State Appellate Defender
Fourth Judicial District
300 E. Monroe - Suite 102
Springfield, Illinois 62701

No. 53474 - People State of Illinois, respondent, vs. Thomas Ray James, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

APPENDIX D

PEOPLE's EXHIBIT NO. 45:

DANVILLE AND VERMILION COUNTY
LAW ENFORCEMENT DEPARTMENTS

INTERROGATION FORM

☒ CITY REPORT
☐ COUNTY REPORT

DATE 5-17-78 RB No. 78-3242

(This form is to be used by all police officers who intend to subject any person in custody to interrogation. It must be filled out carefully and attached to the original police report).

Name of person in custody THOMAS R. JAMES

Address 114½ ILLINOIS ST. City DANVILLE State ILL

Extent of formal education 12 YRS. Male X Female ____

Time Custody Began 5:45 A/M (P/M) Date 5-17-78

Place Custody Began SHAKE RAL RD VER CO. Arresting Officers DEP. CAREY

Custodial Officers at Time of Interrogation INV. WOODARD - INV. LE CONTE

Place of Interrogation INTERVIEW ROOM 237

Time Interrogation Began 9:06 P.M. Time Interrogation Ended 11:15 P.M.

THIS IS TO BE READ, IN FULL, BY THE OFFICER — THE SUBJECT MUST THEN READ IT BACK TO OFFICER:

Thomas R James, hereby state that I have been informed that I have a right to remain silent and that I do not have to talk with the officer(s) unless I want to do so (subject's initials) TJ

I know that if I do say anything that what I say can and will be used as evidence against me for the crime of MURDER or any other crime (list offense) of which I have been accused. TJ (subject's initials)

I know that I have a right to consult a lawyer and have a lawyer present while I am being questioned. I understand that if I am unable to pay for the lawyer, I can have a lawyer appointed for me without any cost to me. TJ (subject's initials)

Knowing and understanding these rights, I waive them at this time and agree to talk with the officer(s); knowing and understanding also that if I desire to stop talking to the officer(s) at any time, I am free to do so. TJ (subject's initials)

I make this waiver freely and voluntarily without any force, promises or threats. TJ

I certify that the above warnings were read to Thomas R James by me on 5-17, 19 78, at 9:11 P.M., and that the subject in custody Thomas R James read the statement of rights back to me, and that the initials recorded above are those of the subject in custody.

Interrogating Officer INV. R. Le Conte Badge Number #2

Witnessing Officer Inv. W. Woodard Badge Number CIT #9

Other Witness: Name ____ Address ____

Name ____ Address ____

PEOPLE'S EXHIBIT 45

FORM 2-11-75

C. 419

RECEIVED
JAN 2 8 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-5799

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ORIGINAL COPY

THOMAS RAY JAMES,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari
To The Appellate Court of Illinois, Fourth
Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

TYRONE C. FAHNER,
Attorney General
State of Illinois

MELBOURNE A. NOEL, JR.,

MARK L. ROTERT,

CAROLYN B. NOTKOFF,
Assistant Attorneys General
188 W. Randolph St., Suite 2200
Chicago, Illinois 60601
(312) 793-2570

COUNSEL FOR RESPONDENT.

QUESTION PRESENTED FOR REVIEW

Whether Miranda v. Arizona requires a per se proscription against questioning of a suspect after a request for counsel is freely withdrawn?

TABLE OF CONTENTS

	Page
CITATIONS	iii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT:	
I. THE ILLINOIS APPELLATE COURT CORRECTLY DECIDED THAT PETITIONER'S RIGHT TO COUNSEL WAS PROPERLY OBSERVED	3
A. Miranda v. Arizona Does Not Require A Per Se Proscription Against Questioning Of A Suspect After A Request For Counsel Is Withdrawn	3
B. Petitioner Effectively Withdrew His Request For Counsel	8
II. THIS COURT NEED NOT CONSIDER WHETHER INTERVENING EVENTS CURE AN ALLEGED FAILURE TO HONOR A REQUEST FOR COUNSEL	11
CONCLUSION	12
APPENDIX	

CITATIONS

	Page
Cobbs v. Robinson, 528 F.2d 1331 (2d Cir. 1975), cert. denied, 424 U.S. 947 (1976)	5
Fare v. Michael C., 442 U.S. 707 (1979)	4
Faretta v. California, 422 U.S. 806 (1975)	5, 11
Johnson v. Zerbst, 304 U.S. 458 (1938)	8, 10, 11
Maglio v. Jago, 580 F.2d 202 (6th Cir. 1975)	5
Michigan v. Mosley, 423 U.S. 96 (1975)	3-5
Miranda v. Arizona, 384 U.S. 436 (1966)	3-5, 8-11
Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) (en banc)	5
North Carolina v. Butler, 441 U.S. 369 (1979)	10
People v. James, 82 Ill. App. 3d 551, 402 N.E.2d 936 (1980)	1-3, 8
Rhode Island v. Innis, ___ U.S. ___, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)	3-5, 9
United States v. Grant, 549 F.2d 942 (4th Cir.), cert. denied, 432 U.S. 908 (1977)	5
United States v. Monti, 557 F.2d 899 (1st Cir. 1977)	6, 7
United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir.)(en banc), cert. denied, 436 U.S. 919 (1978)	5
White v. Finkbeiner, 611 F.2d 186 (7th Cir. 1979), petition for cert. pending, No. 79-6601	5, 6

NO. 80-5799

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THOMAS RAY JAMES,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari
To The Appellate Court of Illinois, Fourth
Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the State of Illinois, requests that this Court deny the petition for writ of certiorari, seeking review of the Illinois Appellate Court's opinion in this case. That opinion is reported as People v. James, 82 Ill. App. 3d 551, 402 N.E.2d 936 (1980).

STATEMENT OF THE CASE

The opinion below objectively and thoroughly sets forth the facts in this case. People v. James, 82 Ill. App.3d 551, 402 N.E.2d 936, 937-9 (1980) (Appendix A at A2-A4). Respondent adopts this summary as its statement of the case.

REASONS FOR DENYING THE WRIT

I.

THE ILLINOIS APPELLATE COURT CORRECTLY DECIDED THAT PETITIONER'S RIGHT TO COUNSEL WAS PROPERLY OBSERVED.

A.

Miranda v. Arizona Does Not Require A Per Se Proscription Against Questioning Of A Suspect After A Request For Counsel Is Withdrawn.

Petitioner states that in Miranda v. Arizona, 384 U.S. 436, 474 (1966), this Court established a per se rule "which prohibits resumption of questioning once a request for counsel has been made." However, nothing in that opinion, or any other opinion of this Court, prohibits a suspect who has requested counsel from freely withdrawing that request.

In detailing the procedures to be followed prior to custodial police interrogation, this Court's foremost concern was to protect a criminal suspect's fifth amendment privilege against self-incrimination. Miranda, 384 U.S. at 467. The right to counsel was intended to assist a suspect in deciding whether to remain silent and was not based on the sixth and fourteenth amendments. Id. at 469; Rhode Island v. Innis, ____ U.S. ____, ____ n.4, 100 S.Ct. 1682, 1689 n.4, 64 L.Ed.2d 297, 307 n.4 (1980).

Despite petitioner's assertion to the contrary, Michigan v. Mosley, 423 U.S. 96, 104 n.10 (1975) did not characterize the Miranda rule where counsel is requested as a per se rule. In Mosley, a suspect who had not requested counsel but had invoked his right to remain silent, was found to have later waived that right. This Court concluded that the Miranda opinion does not "create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." Mosley, 423 U.S. at 102-3.

Respondent does not challenge the continuing validity of the Miranda decision or the procedures to be followed if a suspect in custody asks to consult with a lawyer. See Miranda,

384 U.S. at 474. Rather, respondent posits that since the right to consult with a lawyer under Miranda is intended to protect a person's right to remain silent and is not based on the sixth amendment, this right can likewise be withdrawn.

The reasoning behind the Mosley decision is equally applicable to the instant case, where the court below concluded that petitioner retracted his request for counsel. People v. James, 82 Ill. App.3d 551, 402 N.E.2d 936, 940 (1980) (Appendix A at A5). This Court explained in Mosley as follows:

> To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of question to undermine the will of the person being questioned. At the other extreme, a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests.

Mosley, 423 U.S. at 102.

Surely, if the right to remain silent, once invoked, can later be relinquished, then the right to counsel which stems from the prohibition against self-incrimination can, despite a prior request, also be freely surrendered.

Petitioner cites Fare v. Michael C., 442 U.S. 707 (1979) and Rhode Island v. Innis, ____ U.S. ____, 100 S.Ct. 1682, 64 L.Ed. 2d 297 (1980) to further support his position. However, neither case offers such support.

Fare, 442 U.S. at 719, pointed out that "the Court fashioned in Miranda the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." This cannot be interpreted to preclude a suspect from waiving any of his rights. Miranda, 384 U.S. at 475. Nor does this language rule out the possibility that a suspect may later validly withdraw his request for counsel. The Innis case, where the suspect had invoked his

right to counsel, did not reach the issue of whether he "waived his right under Miranda to be free from interrogation until counsel was present" because the Court concluded the suspect had not been "interrogated." Innis, 100 S.Ct. at 1688 n. 2, 64 L.Ed.2d at 306 n. 2.

Maglio v. Jagno, 580 F.2d 202 (6th Cir. 1978), another case cited by petitioner, is also distinguishable. First, petitioner acknowledges that Maglio involved the sixth amendment right to counsel, a right not at issue in the instant case. Id. at 204. Second, the court in Maglio did not endorse a per se interpretation of Miranda. The court merely opined that Miranda and Mosley "strongly suggest that there is a per se rule barring custodial interrogation of a suspect after a request for counsel has been made." Maglio, 580 F.2d at 205. Third, the Maglio decision did not preclude a waiver in an appropriate case:

> If the police had reexplained Maglio's rights and then withdrawn, allowing the boy to consider his alternative, and he had then initiated further communication with the police, we would be able to find a waiver, and would have to face the question of whether a per se rule governs a request for counsel.

Id. at 206.

The various federal circuit courts have overwhelmingly held Miranda does not require a per se proscription against questioning of a suspect after counsel is requested. White v. Finkbeiner, 611 F.2d 186 (7th Cir. 1979), petition for cert. filed, No. 79-6601; United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir.) (en banc), cert. denied, 436 U.S. 919 (1978); Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) (en banc); United States v. Grant, 549 F.2d 942 (4th Cir.), cert. denied, 432 U.S. 908 (1977); Cobbs v. Robinson, 528 F.2d 1331 (2d Cir. 1975), cert. denied, 424 U.S. 947 (1976).

In White, 611 F.2d at 191, the court explained the folly of a per se rule:

> . . . a per se approach may be going too far t oward protecting the right at stake. A per se rule which provided that a suspect could never waive a prior request for counsel would imprison a suspect in his privileges. Cf. Faretta v. California, 422 U.S.

806 (1975) (cannot force trial counsel on defendant who wishes to proceed without counsel). This is not to say that continued interrogation or any coercion causing the suspect to waive the request need be condoned. Instead it merely is an acknowledgement that in certain instances, for various reasons, a person in custody who has previously requested counsel may knowingly and voluntarily decide that he no longer wishes to be represented by counsel.

The creation of a per se rule would cause courts to lose touch with the purpose and policies behind the Miranda decision--a knowing and free exercise of constitutional rights.[16] Adoption of a per se rule would lead to a mechanical approach to the resolution of the particular cases we face.

---

[16] A hypothetical case might demonstrate the folly of a per se rule. Consider the case where a suspect requests counsel and then is put in a cell. The suspect tells a guard who happens to pass his cell that he has changed his mind. He says that he does not want a lawyer and would like to confess. Certainly it serves no valid policy behind Miranda to refuse to accept the waiver. Indeed, it contravenes the idea in Miranda--that an individual should be able to freely exercise his rights.

Respondent urges this Court to let the view of these circuits stand and eschew the per se rule suggested by petitioner.

In United States v. Monti, 557 F.2d 899 (1st Cir. 1977), the court found that a defendant, who had met with his court-appointed attorney, knowingly and freely waived his right to counsel at a non-custodial meeting with government agents. The defendant had made derogatory comments to the agents about his counsel which the court found "clearly establish[ed] his desire to forego his right to have counsel present at the meeting." Id. at 904. It appears from the opinion that counsel did not advise defendant to waive his right to an attorney.

While not specifically ruling on the existence of a per se rule, the court in Monti concluded not all incriminating statements made in the absence of counsel are suppressible. Id. at 904. The court elaborated this conclusion in a footnote:

> If such were the rule, one who has counsel, with or without counsel's knowledge or instructions, could approach the authorities alone, in an effort to 'deal,' and then, when things went badly, escape the consequences of his voluntary act by relying on the absence of counsel. We have no reason whatever to believe that counsel was in any manner aware of Monti's May 2, 1974, meeting in this case. The hypothetical, however, illustrates the wisdom of avoiding a per se approach.

Id. at 904 n. 3 (emphasis supplied).

Respondent submits that a per se approach is neither wise nor constitutionally mandated and that the opinion of the court below should stand.

B.

Petitioner Effectively Withdrew His Request For Counsel.

Respondent submits that the court below correctly determined that petitioner knowingly and voluntarily withdrew his request for counsel. See Johnson v. Zerbst, 304 U.S. 458, 464-5 (1938). The facts and circumstances of this case, as set forth in the Illinois Appellate Court's opinion, People v. James, 82 Ill. App. 3d 551, 402 N.E.2d 936, 937-9 (1980) (Appendix A at A2-A4), demonstrate that petitioner requested counsel but later intelligently waived counsel's presence.

Petitioner was arrested at approximately 5:20 p.m. on May 17, 1978. (C. 209) On the way to the police station, the Miranda warnings were given to petitioner, and petitioner said he wanted to talk. (C. 215,7) Petitioner also told the arresting officer that "he would like to talk to an attorney." (C. 216). Upon arriving at the station, petitioner was seated in an interview room (C. 224, 232).

Shortly thereafter, Investigators William Hartshorn and Larry Rollins entered the room (C. 238). Investigator Hartshorn testified that, initially, petitioner was not questioned about any crimes:

> The only conversation that I had with Mr. James prior to the formal interrogation form being filled out was when I asked him if he was injured in any way. . . .

(C. 481) When the investigators went in the room, petitioner requested the presence of Investigator Gary Miller and this officer was brought in. Then defendant was advised of his rights (C. 240-1), initialed a written waiver of rights form (C. 240-1, 318), and was questioned for approximately a half hour. (C. 318)

Respondent submits that this action on the part of petitioner amounted to an intelligient and knowing waiver of his request for counsel. There is no authority that prohibits petitioner from voluntarily relinquishing a right or giving a statement to law enforcement authorities after he has been advised of his constitution rights.

Furthermore, repeating the Miranda warnings to petitioner after he had requested counsel did not violate his rights. "The fundamental import of the privilege while an individual is in custody is. . .whether he can be interrogated. . ." Miranda, 384 U.S. at 478. Interrogation means "words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." Rhode Island v. Innis, ____ U.S. ____, ____, 100 S.Ct. 1682, 1690, 64 L.Ed. 2d 297, 308 (1980) (emphasis in original). Surely, a single repetition of Miranda warnings, after a request for counsel, to a suspect who had previously indicated he wanted to talk, does not fit this definition of interrogation. Nor was such admonishment on attempt to break down petitioner's resistance or to elicit a confession.

Subsequent events support the lower court's finding that petitioner's statements were voluntary and properly admitted. After the interview ended, petitioner was given supper. (C. 318) Questioning resumed at 7:24 p.m. but terminated at 8:21 p.m. when petitioner was allowed another break. (C. 319) At 8:55 p.m., petitioner telephoned his employer and advised that he would not be reporting to work. (C. 323-4) He did not ask his boss to contact a lawyer (C. 248, 324), and declined a police offer to make another phone call. (C. 325) The questioning recommenced at 9:05 and lasted until 11:00 p.m. when petitioner was visited by his mother and stepfather. After speaking with his visitors in private for fifty minutes, petitioner was taken to a cell for the night. (C. 325)

Another waiver form was initialed by petitioner at 11:06 a.m. on May 18. (C. 326-7) Each paragraph of the form was read to petitioner, and he was asked if he had any questions concerning his rights. Petitioner responded that he understood the form and had no questions. (C. 328) He then was interviewed for one hour and fifty minutes. (C. 329) After being served lunch and conferring with his parole officer from 1:00 to 2:00 p.m., petitioner awaited the arrival of a polygraph examiner.

A polygraph examination was administered that afternoon following repetition of the Miranda warnings. (C. 330) Afterwards, petitioner was questioned by Investigators Hartshorn and Rollins from 4:15 to 4:25 p.m. and by Officers Robert LeConte and Gene Woodard from 4:30 to 6:05 p.m. (C. 330-1) During the latter interview, petitioner for the first time admitted knowing the deceased and shooting him. (C. 376) Prior to this interview, petitioner was thoroughly admonished of his rights and initialed and signed a written waiver form (C. 350)

Petitioner was served dinner from 6:10 to 7:30 p.m. and then was visited by his father for fifty minutes. (C. 331) Another visitor, Carolyn Burris, met with petitioner beginning at 8:30 p.m. (C. 332) A written confession was submitted by defendant between 9:06 and 11:15 p.m., after another waiver form had been signed. (C. 146, 360) According to petitioner's statement, he killed David Holler at the victim's insistence. (C. 132-4) Following the confession, petitioner again was visited by his mother. (C. 333) No further statements were made by petitioner to the police.

It is undisputed that petitioner did not request counsel while in custody at police headquarters. Nor did he tell any of his visitors on May 17 and 18 that the police had prevented him from obtaining an attorney.

Petitioner urges this Court to fashion guidelines for determining whether an accused has withdrawn a request for counsel. Respondent submits that the traditional standard, that the State must show "an intentional relinquishment or abandonment of a known right or privilege," Johnson v. Zerbst, 304 U.S. 458, 464 (1938), is appropriate for such a situation. See Miranda, 384 U.S. at 475. An explicit statement of waiver is not invariably necessary to support a finding that a request for counsel has been abandoned. See North Carolina v. Butler, 441 U.S. 369 (1979). The conclusion that petitioner knowingly and voluntarily withdrew his request for counsel was based on the appellate court's consideration of "the particular facts and circumstances surrounding that case, including the background,

experience, and conduct of the accused," Johnson, 304 U.S. at 464, and need not be reviewed by this Court.

II.

THIS COURT NEED NOT CONSIDER WHETHER INTERVENING EVENTS CURE AN ALLEGED FAILURE TO HONOR A REQUEST FOR COUNSEL.

Petitioner urges this Court to grant certiorari to consider whether "intervening events cure a failure to honor a post-arrest request for counsel so that statements obtained in violation of Miranda v. Arizona, are admissible." Petitioner at 22. Respondents submit that this question should not now be considered by the Court. As demonstrated in respondent's argument I, supra, petitioner effectively retracted his request for counsel. Furthermore, readmonishing petitioner of his Miranda rights upon arrival at the police station, after petitioner requested counsel, in and of itself, does not constitute a failure to honor the request. Police stations do not have to provide a "station house lawyer" to advise a suspect. Miranda, 384 U.S. at 474. Petitioner's arguments that the repetition of Miranda warnings coerced him into signing the waiver form and making a statement are speculative and not based on evidence in the record.

Petitioner in this case clearly changed his mind and withdrew his request for counsel. No authority or principles preclude him from doing this. See Faretta v. California, 422 U.S. 806 (1975) (right to counsel is personal to accused). As his statement was not taken in violation of Miranda, this Court need not review the appellate court's decision.

CONCLUSION

For all of the above reasons, respondent requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

TYRONE C. FAHNER,
Attorney General
State of Illinois

MELBOURNE A. NOEL, JR.,

MARK L. ROTERT,

CAROLYN B. NOTKOFF,
Assistant Attorneys General
188 W. Randolph St., Suite 2200
Chicago, Illinois 60601
(312) 793-2570

COUNSEL FOR RESPONDENT.

APPENDIX

82 Ill.App.3d 551
37 Ill.Dec. 934

The PEOPLE of the State of Illinois,
Plaintiff-Appellee,

v.

Thomas Ray JAMES,
Defendant-Appellant.

No. 15485.

Appellate Court of Illinois,
Fourth District.

March 28, 1980.

Rehearing Denied April 28, 1980.

Defendant was convicted in the Circuit Court, Vermilion County, Ralph S. Pearman, J., of murder and he appealed. The Appellate Court, Mills, P. J., held that: (1) defendant's statement to arresting officers that he would like to talk to an attorney was sufficient to assert his right to counsel; (2) evidence established that defendant, who had requested counsel, had subsequently retracted his request and waived his right to counsel before confessing; (3) where State contended that motive for defendant's conduct was desire to develop a close relationship with a woman and to prevent anyone else from developing such a relationship, evidence which tended to show defendant's attempts to ingratiate himself with woman was relevant to show that he may have been hostile toward the victim who had stayed at woman's home until 11 p. m. on the day preceding victim's death and the evidence was not inadmissible simply because it may also have tended to prejudice the defendant.

Affirmed.

1. Criminal Law ⇐412.2(1)

Defendant's statement to arresting officers that he would like to talk to an attorney was sufficient to assert his right to counsel.

2. Criminal Law ⇐531(3)

Evidence established that defendant, who had requested counsel, subsequently retracted his request and waived his right to counsel before confessing.

3. Homicide ⇐166(3)

In murder case in which State contended that motive for defendant's conduct was desire to develop close relationship with a woman and to prevent anyone else from developing such relationship, evidence which tended to show defendant's attempts to ingratiate himself with woman was relevant to show that he may have been hostile toward the victim who had stayed at woman's home until 11 p. m. on the day preceding his death and that evidence was not inadmissible simply because it may have tended to prejudice the defendant.

4. Homicide ⇐174(8)

Where note signed with nickname was found in kitchen in which victim's body was discovered and the note had been left at victim's residence on day before the killing by college classmate of victim, evidence concerning defendant's reference to that nickname in his phone conversation with another person following the killing was admissible as circumstantial evidence of defendant's presence at victim's residence at time of the shooting and defendant's attempt to explain the use of the nickname as referring to another person did not bar admission of the evidence.

Richard J. Wilson, Deputy State Appellate Defender, David Bergschneider, Asst. State Appellate Defender, Springfield, for defendant-appellant.

Thomas J. Fahey, State's Atty., Danville, Gary J. Anderson, Acting Deputy Director, State's Attys. Appellate Service Commission, Robert J. Biderman, Staff Atty., Springfield, for plaintiff-appellee.

MILLS, Presiding Justice:

Murder—40 years.

Issue: *Miranda*.

We affirm.

James was found guilty by a jury of murder and armed violence. Judgment was

entered only on the murder charge and a sentence of 40 years' imprisonment was imposed. (This sentence is to be served consecutive to a 30-year sentence imposed on an attempt murder conviction which is now on appeal to this court in Case Number 15306.) Defendant challenges his murder conviction, arguing that the trial court erred in denying a motion to suppress his confession and further erred in admitting evidence as to certain telephone calls that defendant made after the victim's death.

SUPPRESSION HEARING

Prior to trial, defendant moved to suppress certain statements he made to police officers following his arrest. A review of the evidence presented at the suppression hearing, where Judge Paul M. Wright presided, shows that defendant was arrested in a rural area of Vermilion County at approximately 5 p. m. on May 17, 1978. During the evening hours of the day before, the defendant had been involved in an altercation with Samuel Cartwright and defendant knew the police were looking for him in connection with this incident. When the arresting officer, Terry Carey, arrived at defendant's location, defendant held out his hands, and said, "I did it." Defendant was then searched, handcuffed and placed in Carey's squad car. Carey did not question defendant other than to ask his name.

While en route to the Public Safety Building in Danville, Officer Carey radioed headquarters to request that the sheriff and an investigator meet him. Defendant asked Carey if he would be allowed to make a phone call at the jail to which Carey responded affirmatively. About a minute later, defendant requested that Carey inform him of his rights and Carey did so. Shortly thereafter, defendant asked if he could make a second phone call if necessary and Carey said he could. After another minute or two passed, defendant said that "he would like to talk to an attorney." Carey told him he would be allowed to do so. Carey did not attempt to question defendant during the trip to Danville.

Later, while still traveling in Carey's squad car, defendant asked how seriously the man was injured. Carey responded, "Who?" Defendant then told Carey he was referring to the incident the night before and Carey did not respond. Defendant then asked how long he would [illegible] and Carey asked, "For what?" Defendant again stated he was referring to the incident on the previous night. Carey did not reply but once again told defendant he would be allowed to use a phone at police headquarters.

When they arrived at police headquarters, Carey told police investigator William Hartshorn that defendant had been advised of his rights, had asked to speak to an attorney and to use the telephone. Carey also told Hartshorn that he had advised defendant that he could do so. During this conversation, defendant was in an interview room in the Public Safety Building.

Shortly after his conversation with Carey, Hartshorn and investigator Larry Rollins went to the interview room to talk to the defendant. Defendant requested the presence of a certain police officer he was familiar with and this officer was summoned to the room.

At approximately 6:20 p. m.—one hour and 20 minutes after his arrest—the defendant was advised of his rights by investigators Hartshorn and Rollins. He initialed a written form to indicate he understood his rights and then (according to Hartshorn) agreed to answer questions without the presence of an attorney. Hartshorn and Rollins then questioned the defendant about the Cartwright incident until 8:55 p. m. During this period, however, the questioning was interrupted several times. At 6:58 p. m. it was interrupted until 7:24 p. m. and during this time the defendant was served supper. The interview again halted from 8:21 p. m. until 8:53 p. m. At the end of this break, defendant asked to make a phone call and the officers took him to another room where he called his employer. After this phone call, the defendant was asked if he wanted to make another call and he declined the offer. (The defendant

did not ask his employer to contact an attorney but he did ask the officers when he would be taken to court. This question came after defendant was overheard discussing the possibility of bail with his employer. Defendant was told he would be taken to court at 1:30 p. m. on the following day.)

From 9:05 until 11 p. m. defendant was questioned by police officers Robert LeConte and Gene Woodward regarding the shooting death of David Holler which occurred on May 8, 1978. Prior to this interview, defendant was again advised of his rights and he signed another waiver form. At 11 p. m. he was allowed to speak to his mother and stepfather. They were together until 11:50 p. m. when defendant was placed in a cell. The statements which defendant had made to the officers on May 17 were basically exculpatory.

Investigator Rollins testified that at 11 a. m. the following day, May 18, he and Hartshorn went to defendant's cell and asked him if he wanted to talk with the officers. Defendant agreed and he was then taken to the interview room where he was once more advised of his *Miranda* rights and again waived them. As was previously done, each paragraph of the form was read to defendant and he was asked if he understood his rights or had any questions. He responded that he understood the form and had no questions. After this procedure was concluded, defendant was questioned about the death of David Holler. Hartshorn and Rollins concluded this questioning at 1 p. m.

The defendant was served lunch and met with his parole officer from 1 until 2 p. m. Defendant testified that the investigators had already told him that his parole had been revoked but they denied this. They testified that during the previous questioning defendant had expressed concern about his parole and they decided to call the parole officer to talk to defendant about this.

From 2 until 2:55 p. m. defendant was in the interview room by himself awaiting the arrival of a polygraph examiner. After a fifth repetition of the *Miranda* warnings and another waiver of these rights by defendant, a polygraph examination was conducted. It concluded at 4 p. m. and Hartshorn and Rollins then questioned defendant until 4:25 p. m. Investigators LeConte and Woodward questioned the defendant from 4:30 until 6:05 p. m. and during this session the defendant, for the first time, admitted knowing—and shooting—David Holler.

At 6:10 p. m. defendant was served dinner and then spoke with his father from 7:30 until 8:10 p. m. Carolyn Burris, an acquaintance defendant had asked to speak with, met with him from 8:30 until about 9 p. m.

Investigators LeConte and Woodward, after again advising defendant of his rights and obtaining a waiver, took a written statement from about 9 until 10:45 p. m. According to this statement, the defendant had seen David Holler on May 7 on a road near Carolyn Burris' home. He later went to Holler's home and, at Holler's insistence, killed him. During this questioning, defendant also drew several sketches of the crime scene. After the questioning was completed, defendant met with his mother until 11:45 p. m.

Each of the individuals who talked to the defendant on May 17 and 18 testified that he did not tell them he had been refused an attorney. Defendant's parents testified that he looked tired and pale and had difficulty speaking.

Defendant is a 26-year-old man and was the assistant manager of a Hills Brothers shoe store at the time of his arrest. He admitted that he had been questioned by police on previous occasions and further testified that when he arrived at the Public Safety Building on May 17 he asked to make a phone call and to be taken to a hospital because he was cut and bruised from his altercation with Cartwright and chilled from being outside since 5 a. m. May 16. He also testified that he had no sleep since that time. Investigator Hartshorn testified that defendant did not make such requests and, in fact, refused an offer of medical treatment.

Defendant admitted that on May 17 he agreed to talk to the officers about the Cartwright incident. He testified that later that evening he told the officers that he saw no point in talking further with them but they responded that it was necessary to ask him each question 30 times. Defendant denied that the officers allowed him to use the phone to call his employer and stated that he did not recall speaking with his mother or stepfather on May 17.

According to defendant, he gave the police the statement and drew the sketches of the Holler residence because he wanted the questioning to end. He also testified that the police had threatened to continue working on the Holler case and see that defendant was arrested when he was released from prison. The officers denied this. They testified that no promises or threats were made to defendant. Defendant admitted that he did not again request an attorney but explained that this was because he had been told that an attorney could not help him. He agreed to take the polygraph examination only after the officers told him that the questioning would stop if he passed it.

Defendant further testified that on several occasions he expressed a desire to stop the interview but the police persisted. When told that the questioning would stop if he gave a statement, defendant agreed to do so. He could not tolerate returning to prison on a parole violation knowing the State was attempting to convict him on another charge. He did, however, admit that the statement was not forced.

At the conclusion of the suppression hearing, the trial court denied defendant's motion to suppress, ruling that defendant's initial statement to Officer Carey was merely an inquiry or request for information and not a request for counsel. The court found that defendant agreed to talk to the officers and did so knowingly and voluntarily.

Defendant does not argue that this case presents an issue as to the voluntariness of his confession but contends that the police violated his *Miranda* rights by refusing his request for an attorney. He argues that the State failed to show that he subsequently withdrew his request for counsel and therefore his statements were inadmissible because they were the fruits of illegal police conduct.

We disagree.

Whether a defendant's statements to police officers following his arrest were sufficient to constitute a request for counsel has previously been considered by the courts of this state. (*People v. Morrissey* (1977), 49 Ill.App.3d 622, 7 Ill.Dec. 293, 364 N.E.2d 454; *People v. Rafac* (1977), 51 Ill.App.3d 1, 7 Ill.Dec. 700, 364 N.E.2d 991; *People v. Starling* (1978), 64 Ill.App.3d 671, 21 Ill.Dec. 490, 381 N.E.2d 817.) The present case is readily distinguishable from any of the cited cases because here defendant's statement was in the most unambiguous language. The trial court, however, looked to the circumstances surrounding defendant's request (including the numerous other questions propounded to the arresting officer), and concluded that defendant was merely seeking information as to whether he would be allowed an attorney if he so desired. The court did not believe that defendant's statement that "he would like to talk to an attorney" was sufficient to invoke his right to the presence of an attorney during custodial interrogation. See *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

[1] Contrary to the trial court's ruling, we believe defendant's statement to Officer Carey while en route to the Public Safety Building was sufficient to assert his right to counsel. Here, defendant's statement was more than the mere suggestion that perhaps he should speak to an attorney which was held to be an insufficient indication of a desire to consult with counsel in *People v. Krueger* (1979), 74 Ill.App.3d 881, 30 Ill.Dec. 936, 393 N.E.2d 1283. Defendant's request was in the most unambiguous and unequivocal of terms. And it is not without significance that the arresting officer interpreted the statement as a request for counsel. *Maglio v. Jago* (1978), 580 F.2d 202.

A resolution of whether defendant requested counsel does not, however, terminate our inquiry into the question of whether defendant's confession was properly received in evidence. While some courts apparently hold that the right to the assistance of counsel can never be waived by a suspect whose initial request for an attorney has not been honored (*United States ex rel. Williams v. Twomey*, (7th Cir. 1972), 467 F.2d 1248), we believe the question is whether the State has met the "heavy burden" of showing that the defendant knowingly and intelligently waived his right to retained or appointed counsel. *People v. Washington* (1977), 68 Ill.2d 186, 11 Ill.Dec. 603, 369 N.E.2d 57, *cert. denied* (1978), 435 U.S. 981, 98 S.Ct. 1631, 56 L.Ed.2d 72; see also *White v. Finkbeiner* (7th Cir. 1978), 570 F.2d 194 (where the court acknowledged that the State's request to overrule or distinguish *Williams* was an argument not to be lightly dismissed).

[2] The defendant argues that the State failed to meet this heavy burden and that his statements were inadmissible. Because of its ruling that defendant did not request counsel, the trial court did not rule that the defendant had voluntarily retracted his request. Defendant argues that this court should reach that question and rule that defendant did not withdraw the request. The court did rule that defendant agreed to talk to the officers and did so knowingly and voluntarily. The court therefore found that defendant's action in signing the waiver form presented by the officers and his confession were the result of voluntary and knowing acts. Implicit in that finding is a waiver by the defendant of his right to counsel. And, that decision is not against the manifest weight of the evidence. (*People v. Medina* (1978), 71 Ill.2d 254, 16 Ill. Dec. 447, 375 N.E.2d 78.) While testifying at the suppression hearing, defendant admitted that he agreed to talk to the officers on May 17 and further testified that the statement he gave to them on May 18 was not the result of force. His testimony that he gave a statement only to stop the questioning was apparently rejected by the trial court. The evidence shows that subsequent to his request for counsel he agreed to talk to the officers without an attorney being present and he signed four forms which stated that he waived his *Miranda* rights. We believe that this evidence clearly shows that defendant retracted his request for counsel.

The situation presented here is not unlike that presented to our supreme court in *People v. White* (1975), 61 Ill.2d 288, 335 N.E.2d 457, *cert. denied* (1976), 424 U.S. 970, 96 S.Ct. 1469, 47 L.Ed.2d 738, where the court ruled that the effect of the procedural violation of *Miranda* was sufficiently dissipated so that the defendant's confession was voluntary and, therefore, properly received in evidence. In *White*, the police failed to furnish the defendant (a borderline retardate) with an attorney on the morning of his arrest on an unrelated offense. He was questioned later that day and also during the morning and afternoon of the following day. On each of these three occasions he was advised of his rights. With respect to the offense involved in the appeal, the defendant was not questioned until the third day and then only after receiving the full *Miranda* warnings. The supreme court affirmed his conviction because the effect of failing to provide him with counsel on the morning of his arrest was sufficiently dissipated by the time of his confession during the morning of the second day following the arrest. Among the factors discussed by the court in *White* were the lapse of time between the violation and the confession, the repeated admonitions, the fact it was not the first time the defendant had been charged with a crime, and that the subsequent waiver of the right to counsel occurred during questioning about an offense unrelated to the offense for which the defendant invoked the right.

Similarly, here defendant was advised of his rights six times and signed four different written waivers of those rights between the time of his arrest at approximately 5 p. m. on May 17 and his confession which was obtained sometime after 4:30 p. m. on May 18. While repeated admonitions alone will not always break the causal connection be-

tween the illegality and the confession (*White*), such factor is not to be disregarded. Not only did defendant sign the four waiver forms but, according to investigator Hartshorn's testimony, defendant agreed to answer the officer's questions without an attorney being present.

Other factors affecting the admissibility of defendant's confession include the passage of nearly 24 hours between the violation of *Miranda* and the statement sought to be suppressed. Thus, the interrogation which produced the confession did not immediately follow the request for counsel and during the interim defendant was allowed numerous breaks, including an 11-hour period where he was allowed to sleep. He was also allowed to meet with his mother, father, stepfather, Carolyn Burris, and his parole officer. According to the police officer's testimony, defendant's request to use the telephone was granted and he declined an offer to make additional calls. (See *People v. Smith* (1969), 108 Ill.App.2d 172, 246 N.E.2d 689, *cert. denied* (1970), 397 U.S. 1001, 90 S.Ct. 1150, 25 L.Ed.2d 412.) We also note that unlike the defendant who was a borderline retardate in *White*, this defendant was 26 years old, had a high school education, and was the assistant manager of a Hills Brothers shoe store. At the time of his arrest he was on parole and certainly no stranger to the criminal justice system. He admitted that he had been questioned by police officers prior to this incident.

Furthermore, an examination of the circumstances surrounding defendant's request for counsel shows that it was made at a time when defendant was expressing concern about an offense different from the offense involved in this appeal. Under the circumstances of this case, and contrary to defendant's assertions, we believe that the record clearly shows that defendant knowingly and voluntarily withdrew his request for counsel. Additionally, we conclude that the effect of the procedural violation of *Miranda* was sufficiently dissipated so that defendant's statements were voluntary and properly admitted.

THE TRIAL

The State attempted to show defendant's motive for taking the life of David Holler by presenting evidence that for some time prior to the death of Holler the defendant had attempted to develop a close personal relationship with Carolyn Burris. The defendant had visited her home on several occasions and as he was concluding one of these visits he suddenly kissed Ms. Burris. The following day Ms. Burris went to the shoe store where defendant was employed to tell him that she did not want to become romantically involved. Defendant put his arm around her and she told that she had a boyfriend whom she did not want to lose.

Burris' statements to the defendant did not halt his visits to her home and on May 6 he unexpectedly arrived there at about 10:30 p. m. Burris, who had been asleep, told defendant that she had to get up early the next day and that he should not come by her house unless he first telephoned her.

On Sunday, May 7, the victim (David Holler) visited Burris at her place of employment to return some materials he had borrowed. He accepted an invitation to her home where he played chess with her children, ate supper, and left at about 11 p. m.

David Holler died between 3 and 7 a. m. on May 8, 1978, from gunshot wounds to his head. His body was discovered in the kitchen of his home by his parents on the same date. A note signed "Debbie" was also found in the kitchen on a table. It had been left at Holler's residence on May 7 by Debbie Jones, a classmate of Holler's at a local junior college. She had stopped by Holler's home to return some items and when she discovered he was not at home she left the note.

Carolyn Burris learned of Holler's death on May 8 at about 5 p. m. The following day, after she talked to police, she called defendant to tell him that he would probably be questioned by them. Over defense objection, Burris testified that she received a phone call from defendant on May 15. In the ensuing conversation, defendant told her that he had been questioned by police

and that Burris was under investigation for murder. She also testified that the defendant told her that he would see that she did not go to jail.

Defendant testified that he told Burris that the police had no suspects and that he did not tell her the police had a good case of murder against her. He admitted that he told her that if she was in trouble, he would do whatever he could.

Testimony was also presented, over defense objection, which indicated that subsequent to Holler's murder defendant called Carolyn Burris' former husband. During the brief conversation, defendant mentioned the name "Debbie" to the former husband. Defendant later testified that he was referring to Carolyn Burris' youngest daughter.

Defendant now contends the trial court erred in admitting evidence of the phone calls which he made to Carolyn Burris and to her former husband. He argued that these phone calls were not relevant because they had no probative value. If they had any probative value, he contends it was outweighed by the prejudicial effect. Defendant claims that his credibility was an essential factor in his defense because he needed to convince the jury that his confession was false. During the phone call to Carolyn Burris, he allegedly made statements which were not supported by other evidence in the record and, defendant argues, the jury may have concluded that he lied when he told Burris that the police suspected her of committing the murder. In addition, defendant and Burris gave conflicting testimony concerning the content of this call and again defendant argues his credibility was adversely affected.

[3] We disagree with defendant's contentions. His phone call to Carolyn Burris was relevant (as the State contends) because it tends to support the State's theory that the motive for defendant's conduct was a desire to develop a close relationship with Burris and to prevent anyone else from developing such a relationship. Evidence is admissible if it fairly tends to prove the offense charged. Any circumstances may be put into evidence which tend to make the proposition at issue either more or less probable. (*People v. Galloway* (1963), 28 Ill.2d 355, 192 N.E.2d 370, *cert. denied* (1964), 376 U.S. 910, 84 S.Ct. 665, 11 L.Ed.2d 608.) The only evidence to connect the defendant to David Holler was Carolyn Burris. Certainly evidence which tended to show defendant's attempts to ingratiate himself with Burris was relevant to show that he may have experienced hostility toward the man who stayed at her home until 11 p. m. on the day preceding his death. This testimony was not inadmissible simply because it may also have had a tendency to prejudice the defendant. *People v. Hairston* (1970), 46 Ill.2d 348, 263 N.E.2d 840, *cert. denied* (1971), 402 U.S. 972, 91 S.Ct. 1658, 29 L.Ed.2d 136.

[4] The evidence concerning defendant's reference to "Debbie" in his phone conversation with Burris' former husband was offered by the State to establish defendant's presence at Holler's residence at the time of the shooting. While defendant's reference to "Debbie" did not conclusively prove his awareness of the note found at Holler's residence, the testimony was circumstantial evidence of defendant's presence at the scene and as such properly admissible. That defendant attempted to explain this as a reference to Burris' daughter did not bar admission of this evidence.

Finally, in his brief defendant argued that imposition of a consecutive sentence was error because the trial court's act in not imposing an extended term of imprisonment was tantamount to a conclusion that consecutive sentencing was not required to protect the public from further criminal conduct by the defendant. (*People v. Dawson* (1975), 30 Ill.App.3d 147, 332 N.E.2d 58.) During oral argument, however, defendant properly withdrew this argument on the basis of our supreme court's opinion in *People v. Snyder* (1979), 77 Ill.2d 459, 34 Ill.Dec. 127, 397 N.E.2d 799.

Affirmed.

CRAVEN and WEBBER, JJ., concur.

DISTRIBUTED FEB 4 1981

Office-Supreme Court, U.S.
FILED
FEB 4 1981
ALEXANDER L. STEVAS, CLERK

No. 80-5799

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ORIGINAL COPY

THOMAS RAY JAMES, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI

TO THE APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PETITIONER'S REPLY MEMORANDUM

DAVID P. BERGSCHNEIDER
Assistant Defender
Office of the State Appellate Defender
Fourth Judicial District
300 East Monroe, Suite 102
Springfield, IL 62701
(217) 782-3654

COUNSEL FOR PETITIONER

DANIEL D. YUHAS
Deputy Defender

OF COUNSEL

No. 80-5799

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THOMAS RAY JAMES, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

PETITIONER'S REPLY MEMORANDUM

In its opposing brief, the State of Illinois misapprehends petitioner's argument concerning whether Miranda v. Arizona imposes a per se rule against renewed questioning of a suspect who has requested counsel. Petitioner does not contend that a request for counsel, once made, can never be withdrawn. However, petitioner contends that Miranda imposes a per se bar against reinstigation of the interrogation process in the hope that the accused will not renew his request for counsel. The question involved in this case is not whether the accused should be permitted to reinitiate contact with the police, as in the hypothetical example cited on page 6 of the Brief in Opposition. To the contrary, the issue here is whether the police, without any indication that the accused has changed his mind and might want to withdraw his earlier request, may renew questioning after refusing to permit the accused to see an attorney.

A per se rule against renewed interrogation after a request for counsel does not "imprison a suspect in his privileges" (Brief in Opposition, p. 5), because the accused is always free to contact police and state that he has changed his mind. However, the per se rule prohibits the police from reinstigating interrogation after an unhonored request for counsel.

At several points in its brief, the State asserts that Miranda is not violated where police readvise a suspect of his Miranda rights although they are aware that the suspect's recent request for counsel has not been honored. (See Brief in Opposition, pp. 9, 11) The State thus argues that after a request for counsel is made, the police may immediately readvise the accused of his Miranda rights, even though no attempt has been made to supply an attorney and although there is no plausible explanation for reiterating the warnings except the hope that a statement can be obtained. In order to arrive at this conclusion, the State attempts to limit the term "interrogation", as used in Miranda, to questions which actually elicit an incriminating response. (Brief in Opposition, p. 9)

Although Miranda uses the term "interrogation," that term was not intended to be interpreted as narrowly as urged by the State. Readvising an accused of his Miranda rights, only minutes after he has requested an attorney, is obviously the first step in renewing the interrogation process. The State's interpretation would permit the police to ignore repeated requests for counsel and continue to give Miranda warnings until the defendant agrees to talk.

As this Court made clear in Miranda and Michigan v. Mosley, the police must scrupulously honor an attempt by the accused to exercise his right to counsel. The police may

not seek to "wear down" the defendant by continued interrogation after counsel is requested. See Miranda, 384 U.S. at 476.

The State contends that the police must be permitted to readmonish an accused of his Miranda rights after a request for counsel because "[P]olice stations do not have to provide a 'station house lawyer' to advise a suspect." (Brief in Opposition, p. 11) Miranda mandates that police may decide not to provide an attorney only if they refrain from any attempt to obtain a statement. 384 U.S. at 474. Miranda cannot be interpreted to justify repeated questioning where there is no indication by the accused that he wished to withdraw his request.

In this case, the only reasonable interpretation of Investigater Hartshorn's decision to readvise petitioner of his Miranda rights is that Hartshorn hoped that Mr. James would be too intimidated to demand that his request for counsel be honored. The State suggests no other explanation of Hartshorn's actions, and the record permits no other explanation. Because Investigator Hartshorn renewed interrogation of petitioner in a deliberate attempt to obtain a statement without honoring the prior request for counsel, this Court should grant certiorari.

Respectfully submitted,

January 30, 1981

DAVID BERGSCHNEIDER
Assistant Defender

COUNSEL FOR PETITIONER